DOCKET

No. 86-2037-CFX
Status: GRANTED

Title: Paul G. Landers, Petitioner
v.
National Railroad Passenger Corporation, et al.

Docketed:
June 19, 1987

Court: United States Court of Appeals
for the First Circuit

Counsel for petitioner: Miller III,Clinton J.

Counsel for respondent: Ross,Harold A., Henderson,Harold R.

Entry	Date	Note	Proceedings and Orders
1	Jun 19 1987	G	Petition for writ of certiorari filed.
2	Jul 20 1987		Brief of respondent Bhd. of Locomotive Engineers in opposition filed.
3	Jul 22 1987		DISTRIBUTED. September 28, 1987
4	Sep 8 1987		Response requested of Amtrak Sept. 8, 1987. Due October 8, 1987 (HAB, BRW)
7	Oct 6 1987		Order extending time to file response to petition until November 7, 1987.
8	Nov 7 1987		Brief of respondent National Railroad Passenger Corp. in opposition filed.
10	Nov 10 1987		REDISTRIBUTED. November 25, 1987.
11	Nov 30 1987		Petition GRANTED.
			**********
13	Dec 30 1987		Order extending time to file brief of petitioner on the merits until January 28, 1988.
16	Jan 28 1988		Brief amici curiae of AFL/CIO, et al. filed.
14	Jan 29 1988		Joint appendix filed.
15	Jan 29 1988		Brief of petitioner Paul G. Landers filed.
17	Feb 5 1988		Record filed.
		*	Certified copy of original record and proceedings, received. (Box).
18	Feb 5 1988		SET FOR ARGUMENT, Tuesday, March 29, 1988. (1st case).
19	Feb 12 1988	D	Motion of respondents for divided argument filed.
26	Feb 16 1988	X	Reply brief of petitioner Paul G. Landers filed.
20	Feb 22 1988		Motion of respondents for divided argument DENIED.
21	Feb 26 1988		Brief of respondent National Railroad Passenger filed.
23	Feb 29 1988	X	Brief of respondent Bhd. of Locomotive Engineers filed.
22	Mar 1 1988		CIRCULATED.
24	Mar 1 1988	D	Motion of respondents to reconsider order denying motion for divided argument filed.
25	Mar 7 1988		Motion of respondents to reconsider order denying motion for divided argument DENIED.
28	Mar 29 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

No. 86-2037

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PAUL G. LANDERS,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Date: June 19, 1987

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QUESTION PRESENTED FOR REVIEW

May a railroad operating employee who satisfies the union membership requirement in a collective bargaining agreement by paying dues to a union national in scope, as permitted by Section 2 Eleventh(c) of the Railway Labor Act (45 U.S.C. § 152 Eleventh(c)), be deprived of his union's assistance in disciplinary proceedings and appeals on the property of the railroad?

PARTIES TO THE PROCEEDINGS BELOW

1. Paul G. Landers — plaintiff-appellant below.
2. National Railroad Passenger Corporation (Amtrak) — defendant-appellee below.
3. Brotherhood of Locomotive Engineers — defendant-appellee below.

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OCTOBER TERM, 1986

PAUL G. LANDERS,

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v.

NATIONAL RAILROAD PASSENGER CORP., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FIRST CIRCUIT

Petitioner Paul G. Landers respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the First Circuit to review, and upon review, to reverse the March 24, 1987 decision of that Court in *Landers* v. *National Railroad Passenger Corporation, et al.*, 814 F.2d 41 (1st Cir. 1987).

OPINIONS BELOW

The opinion of the court of appeals, which is officially reported at 814 F.2d 41, and the memorandum opinion of the district court for the District of Massachusetts, not yet reported, appear in the Appendix at 1a-17a and 19a-33a, respectively.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1987. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statute involved in this proceeding is the Railway Labor Act (45 U.S.C. § 151, *et seq.*), pertinent portions of which are set forth at 35a-44a. A provision of the National Labor Relations Act (29 U.S.C. § 159(a)) used for comparison herein is set forth at 35a.

[1]References to "App." are to the Appendix in the court of appeals, and those to pages with the suffix "a" to the appendix attached hereto.

STATEMENT OF CASE

On February 21, 1984, Paul G. Landers ("Landers"), who is an employee of the National Railroad Passenger Corp. ("Amtrak"), in the craft of passenger engineer, and who is a member of the United Transportation Union ("UTU"), although engineers are represented on Amtrak for purposes of contract negotiation by the Brotherhood of Locomotive Engineers ("BLE"), filed this action. The Complaint was filed to enforce Landers' right to have his discipline case and grievances handled by UTU as his selected representative, both on the property of Amtrak and at the National Railroad Adjustment Board under Section 3 First of the Railway Labor Act (45 U.S.C. § 153 First) or a public law board created by Amtrak and UTU under Section 3, Second of the Railway labor Act (45 U.S.C. § 153 Second) ("RLA"). (App. at 4-9).

The Complaint claimed that Amtrak denied those rights to Landers as a member of UTU in violation of Sections 2 and 3 of the RLA (45 U.S.C. §§ 152 and 153). Amtrak relied on the agreement for the craft of engineers it had with BLE. The Complaint further claimed that the exclusive representation provisions of that agreement, restricting discipline and grievance handling to BLE even for members of UTU, violates the RLA. BLE was joined as a party pursuant to *Fed. R. Civ. Pro.* 19. *(Id.)*.

BLE filed a motion to dismiss or for summary judgment on October 7, 1984, asserting that the Court lacked jursidiction because it was a representation dispute within the exclusive jurisdiction of the National Mediation Board under 2 Ninth of the RLA (45 U.S.C. § 152 Ninth), or was a "minor dispute" within the jurisdiction of the National Railroad Adjustment Board under 3 First of the RLA (45 U.S.C. § 153 First), which Landers had failed to exhaust as a remedy. (App. at 20-22).

The parties filed a statement of undisputed facts on October 11, 1984. (App. at 137-42). A civil non-jury

trial was held on November 19, 1984, and April 2, 1986. (App. at 155-84; 202-69). On June 24, 1986, the district court in its Memorandum and Order rejected the jurisdictional arguments of BLE and Amtrak, but nonetheless granted judgment against Landers on the basis of its construction of Section 3 of the Railway Labor Act (45 U.S.C. § 153) that it was permissble for an exclusive representation clause to exist thereunder for discipline and grievance handling on the property. (19a-33a). The order of the same date granted judgment in favor of Defendants and against Plaintiff, and was filed on June 27, 1986. (34a). On appeal, the First Circuit affirmed (1a-17a). In the course of its March 24, 1987 decision the First Circuit, *inter alia*, specifically declined to follow the decision of the Fifth Circuit in *Taylor* v. *Missouri Pacific R. Co.*, 794 F.2d 1082 (5th Cir.), *cert. denied sub nom. United Transportation Union* v. *Taylor*, _____U.S. _____, 93 L.Ed.2d 721 (1986).

STATEMENT OF FACTS

The statement of undisputed facts (App. at 137-42) accurately reflects the facts in the case at bar.

Landers has been employed by Amtrak since January 1, 1983 as a Passenger Engineer. Amtrak is a corporation created by the Rail Passenger Service Act of 1970, 45 U.S.C. § 541 *et seq.*, for the purpose of providing intercity rail passenger service within the United States. Pursuant to 45 U.S.C. § 546(b), Amtrak is subject to federal labor statutes covering railroads and is a "carrier" as defined in Section 1, First of the RLA, 45 U.S.C. § 151 First.

BLE is an unincorporated association and a labor organization national in scope, organized in accordance with the Railway Labor Act, and admits to membership railroad employees in the craft or classes of locomotive engineers and firemen. The BLE is a "representative" of employees within the meaning of the Railway Labor Act, 45 U.S.C. § 151. The BLE is

qualified to and has appointed two labor members of the First Division at the National Railroad Adjustment Board under Section 3 of the RLA, 45 U.S.C. § 153. The BLE is the bargaining representative for the craft or class of passenger engineers employed by Amtrak, and effective January 1, 1983, has been a party to the written collective bargaining agreement with Amtrak for that craft or class. The BLE's agreement with Amtrak provides for rates of pay, hours of work, health and welfare benefits, seniority rights, and other terms and conditions of employment for the craft or class of passenger engineers. (App. at 42-61).

Among other things, the collective bargaining agreement entered into by BLE and Amtrak contains discipline and investigation rules, and machinery for resolution of disputes involving the interpretation and application of the provisions of the agreement covering the craft or class of passenger engineers. Rule 1c. defines the "duly accredited representative" as "the General Chairman of the Brotherhood of Locomotive Engineers having jurisdiction or any elected officer of the Brotherhood of Locomotive Engineers designated by the General Chairman." Rules 20 and 21 of the BLE agreement provide that a claim by a passenger engineer for compensation "may be made only by a claimant or, on his behalf, by a duly accredited representative"; that the passenger engineer and "his duly accredited representative will have the right to be present during" disciplinary investigations; that the engineer or his duly accredited representative may process appeals of any claim, grievance, or disciplinary action; and that the General Chairman may process appeals at the final stage of handling with the highest officer of Amtrak designated to handle appeals. If unsuccessful at the company, the passenger engineer may progress his claim to binding arbitration before the First Division of the National Railroad Adjustment Board, where he "may be heard in person, by counsel, or by other represen-

tatives," as he may elect, in accordance with Section 3, First (j) of the Railway Labor Act, 45 U.S.C. § 153, First (j).

The UTU is an unincorporated association and a labor organization national in scope, organized in accordance with the Railway Labor Act and admits to membership railroad employees in the crafts or classes of locomotive engineers, firemen, conductors, trainmen and yardmen. The UTU is qualified to and has appointed two labor members of the First Division of the National Railroad Adjustment Board under Section 3 of the RLA, 45 U.S.C. § 153.

The UTU is the bargaining representative for the crafts of engine attendants, passenger conductors and assistant conductors employed by Amtrak. Since January 1, 1983, the UTU has been a party to written collective bargaining agreements with Amtrak for these crafts. The collective bargaining agreements entered into between Amtrak and UTU (C) and (T) for the crafts or classes of passenger conductors and assistant passenger conductors and between Amtrak and UTU (E) for the craft or class of engine attendants contain provisions for claims and grievance handling and representation at investigations. (App. at 62-94; 105-136). Similar to the provisions of the BLE agreement, these provisions define "duly accredited representative" to be the local chairman of the respective local unit of UTU "or a member of the UTU designated by the General Chairman," and designate the "duly accredited representative" to appear at investigations of conductors and engine attendants and to process any claims, grievances or appeal for that craft or class of employees.

No passenger engineer at Amtrak performs any services in or is temporarily transferred to any craft or class of service at Amtrak as to which the BLE is not the duly designated and authorized representative for purposes of the collective bargaining agreement or the Railway Labor Act. No Amtrak pas-

senger engineer holds employment rights in any craft or class at Amtrak other than passenger engineer. No employee in any craft represented by the UTU on Amtrak holds seniority or employment rights in the craft of passenger engineers.

Prior to January 1, 1983, Amtrak's trains on the Northeast Corridor were operated by Conrail engineers pursuant to contractual arrangements between Amtrak and Conrail. Those engineers were employees of Conrail represented for purposes of collective bargaining by the BLE. After January 1, 1983, Amtrak began employing passenger engineers on the Northeast Corridor, including Landers. (App. at 35-41).

On approximately February 17, 1984, Landers was charged with misconduct while performing his assignment as a passenger engineer. An investigatory hearing into these charges was conducted on February 28, 1984. At that hearing, Landers appeared and represented himself. He had previously requested to be represented by UTU, but was advised by Amtrak that under the terms of the collective bargaining agreement he could only be represented by a duly accredited representative of his craft.

On March 6, 1984, Amtrak concluded that the disciplinary charges against Landers had been proven and assessed Landers 30 days actual suspension. Landers did not appeal his suspension to the National Railroad Adjustment Board. Landers' suspension has been served and he has returned to work as a passenger engineer.

REASONS FOR GRANTING THE WRIT

1. This Court should decide the important statutory issue under the Railway Labor Act of whether the right of operating employees to company level grievance handling by a representative of their choice, a choice plainly protected by the Act itself in Section 2 Eleventh(c) (45 U.S.C. § 152 Eleventh(c)),

may be negated by a collective bargaining agreement.

The decision below departs from well settled decisional law and the plain meaning of the Railway Labor Act ("RLA") on the issue of grievance handling by the union of membership for operating employees. Section 2, Second, Third and Sixth (45 U.S.C. §§ 152, Second, Third and Sixth) and Section 3, First (j), (45 U.S.C. § 153 First (j)) clearly grant railroad employees the right to choose their union representative to act in their behalf in presenting "minor disputes," *i.e.*, disputes which concern grievances and contract interpretation or application questions. As held by the Seventh Circuit in *McElroy v. Terminal R.R. Ass'n. of St. Louis*, 392 F.2d 966, 969 (7th Cir. 1968), *cert. denied*, 393 U.S. 813 (1969), the RLA "guarantees an individual employee the right to prosecute his grievance through any representative he may designate." *Accord, Taylor v. Missouri Pacific Railroad Company, supra.*

Moreover, it is clear that an employee's claims or grievances are his own to be handled independently by him or through the representative of his choosing, and cannot be interfered with by the carrier and/or the bargaining representative for the craft. *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945), *aff'd on reh.*, 327 U.S. 661 (1946). In accord with the holding of the Seventh Circuit in *McElroy v. Terminal R.R. Ass'n.*, *supra*, and the Fifth Circuit in *Estes v. Union Terminal Co.*, 89 F.2d 768, 15 770 (5th Cir. 1937), and *Taylor v. Missouri Pacific R. Co., supra*, other courts having the issue before them have held that an employee may choose his own representative to represent him in the processing of his claims and grievances. *General Committee v. Southern Pacific Co.*, 132 F.2d 194, 201 (9th Cir.), *reversed on other grounds*, 320 U.S. 338 (1942); *Douds v. Local 1250, Retail, Wholesale & Department Store Union*, 173 F.2d 765 (2d Cir. 1949). *See also*, 40 *Op. A. G.* 494 (1946), in which United States Supreme Court Justice Tom C. Clark (then Attorney

General) advised the President, in response to a request for an opinion from the National Mediation Board, that the RLA guarantees the right of the railroad employee to prosecute his grievance personally or through any representative he may designate, including a minority union. The doctrine of individual choice in grievance handling by railroad operating employees (including engineers, firemen, conductors, trainmen and switchmen) is inextricably intertwined with Section 2, Eleventh (c) of the RLA, 45 U.S.C. § 152, Eleventh (c), which permits all operating employees, whether engineers, firemen, conductors, trainmen, or switchmen, to satisfy the union shop requirements of compulsory union membership agreements entered into by BLE through membership in UTU. *Pennsylvania R.R. v. Rychlik*, 352 U.S. 480 (1957); *O'Connell v. Erie-Lackawanna R.R.*, 391 F.2d 156 (2d Cir. 1968); *Birkholz v. Dirks*, 391 F.2d 289 (7th Cir. 1968). Obviously, this statutory protection for membership in either operating craft union contemplates protection of grievance representation, the most critical benefit of membership. As the Fifth Circuit observed in *Taylor v. Missouri Pacific R. Co., supra*, the benefits of membership in the union of choice for operating employees would be meaningless unless their union could handle their claims and grievances. 794 F.2d at 1086.

All parties admit that BLE is the bargaining representative for the craft of engineers, and that the agreement negotiated by BLE and Amtrak governs the rates of pay, rules and working conditions of employees working in that craft. And all parties agree that the BLE-Amtrak agreement for the engineer's craft restricts grievance representation to BLE only. Barring Mr. Landers from having his grievance handled by his own union reduces his statutorily protected right to membership in the union of his choice, as the Fifth Circuit noted in *Taylor, supra*, to that of membership in a social organization. *Id.*

2. This Court should grant the petition because of a clear conflict in the circuits as to the question of the permissibility of interference in the choice of railroad operating employees of their union membership, guaranteed by the Railway Labor Act, by barring their chosen representative from participation in discipline and grievance matters on the property of the carrier.

The Fifth Circuit in *Taylor v. Missouri Pacific R. Co.*, *supra*, clearly held that an operating employee on the railroad is entitled to have the union of his membership handle his grievance at the company level because, *inter alia*, to do otherwise would render his membership nugatory. *Id.* Moreover, the Fifth Circuit noted in *Taylor*, *supra:*

> We conclude that our decision today accords with the holdings or leanings of our colleagues in the Seventh, Eighth, and Tenth Circuits. *McElroy; General Committee of Adjustment v. Burlington Northern, Inc.*, 563 F.2d 1279 (8th Cir. 1977); *Brotherhood of Locomotive Engineers v. Denver & R.G.W.R. Co.*, 411 F.2d 1115 (10th Cir. 1969); . . . *Id.*

The First Circuit decision below is obviously in conflict with other circuits. In fact, the decision below is overt in its rejection of the holding of the Fifth Circuit in *Taylor*, *supra*, stating:

> The most formidable precedent favorable to the Plaintiff is *Taylor v. Missouri Pacific Railroad Co.*, *supra*, where a panel of the Fifth Circuit concluded that the right of a railway worker to join the union of his choice — a right which, we agree, is guaranteed by the RLA — includes by necessary implication an entitlement to have that organization represent him at a company-level proceeding. *Taylor*, 794 F.2d at 1086. We resist the temptation to try to distinguish

> *Taylor*, and treat it as very much in point. But, we find its analysis of the central issue to be unpersuasive, and we decline to follow it. 814 F.2d at 47.

The court of appeals' reliance upon pre-*McElroy* Seventh Circuit precedent (*Id.* at 48) as support for its decision only clarifies the obvious conflict in the circuits on this question.

CONCLUSION

For the foregoing reasons, Petitioner Paul G. Landers respectfully asks that the writ be issued as requested herein.

Respectfully submitted,

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Date: June 19, 1987

APPENDIX A:

OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS

No. 86-1776

PAUL G. LANDERS,
Plaintiff, Appellant,

v.

NATIONAL RAILROAD PASSENGER CORPORATION, *et al.*,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Robert E. Keeton, *U.S. District Judge*]

Before
Coffin and Selya, *Circuit Judges*,
and Gignoux,* *Senior District Judge*.

Clinton J. Miller, III, Assistant General Counsel, with whom *James F. Freeley, Jr.* and *Freeley & Freeley* were on brief for appellant.

Harold A. Ross with whom *Ross & Krauxhaar Co., L.P.A.*, *Paul Kelly* and *Segal, Roitman & Coleman* were on brief for Brotherhood of Locomotive Engineers.

Joanna L. Moorhead with whom *William Shaw McDermott* and *McDermott & Rizzo* were on brief for National Railroad Passenger Corporation.

March 24, 1987

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*Of the District of Maine, sitting by designation.

SELYA, *Circuit Judge*. The appellant, Paul G. Landers, has been working on the railroad for numerous live-long days. During the last four years, he passed the time away as an engineer for defendant/appellee National Railroad Passenger Corporation (Amtrak). Amtrak was created by the Rail Passenger Service Act of 1970, 45 U.S.C. §§ 541 *et seq.* Pursuant to 45 U.S.C. § 546(b), Amtrak is subject to the federal labor statutes governing railroads. Accordingly, the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (RLA), applies to this case.

Amtrak and the defendant/appellee Brotherhood of Locomotive Engineers (BLE), a labor union, entered into a collective bargaining agreement (Agreement). The Agreement, inter alia, denominated the BLE as the bargaining representative for Amtrak's passenger engineers and provided a panoply of terms and conditions of employment for the craft (or class) of passenger engineers. While the Agreement was signed on October 26, 1982, Amtrak did not begin employing passenger engineers directly until January 1, 1983. The appellant was among the early hires; he was a member of the United Transportation Union (UTU), rather than the BLE.

On February 17, 1984, Landers was charged with misconduct while toiling on an Amtrak train. A company-level investigatory hearing was convened. The appellant asked to be represented by the UTU. Amtrak demurred, taking the position that, under the Agreement, a passenger engineer could be assisted at such a hearing only by the bargaining agent. Landers represented himself at the hearing; he received and served a thirty day suspension. He did not claim an appeal to the National Railroad Adjustment Board (Board), a forum in which he had an undisputed right to be represented by the UTU. *See* 45 U.S.C. § 153, First (j). Instead, Landers brought suit in the United States District Court for the District of Massachusetts seeking declaratory relief against both

Amtrak and the BLE. He claimed that his prerogatives under §§ 2 and 3 of the RLA, 45 U.S.C. §§ 152, 153, were transgressed when he was denied the "right" to have his union represent him at the investigatory hearing.

Following a bench trial, the district court (Keeton, J.) issued a thoughtful memorandum of decision. *Landers* v. *National Railroad Passenger Corporation*, C.A. No. 84-467-K (D. Mass. June 24, 1986) *(Landers I)*. Judge Keeton found that the Agreement prohibited an employee's representation by the (minority) union of his choice in an on-property investigatory hearing. *Id.* at 17-18. Landers does not dispute this point. He does, however, hotly contest the court's holding that nothing in the RLA or in the facts of the case gave Landers an unfettered right to representation at such a session by a union other than the BLE. *Id.* We agree with the district court, and therefore affirm.[1]

I.

We start with a brief overview of certain provisions of the Agreement. Pursuant to Rule 1b therein, Amtrak recognized the BLE "as bargaining representative of all Passenger Engineers employed by [Amtrak] in the Northeast Corridor." Rule 1c defined "duly accredited representative" to mean the "General Chairman of the Brotherhood of Locomotive Engineers having jurisdiction or any elected officer of the Brotherhood of Locomotive Engineers designated by the General Chairman." Further provisions of the Agreement illuminated the significance of these designations. Two examples will suffice. Under Rule 20a "[a] claim for compensation alleged to be due may be made only by a claimant or, on his behalf, by a duly

[1]Amtrak and the BLE originally contested subject matter jurisdiction and raised the spectre of (non)exhaustion of administrative remedies. The district court ruled adversely to them on these topics. *Landers I*, slip op. at 1-8. The appellees have not pressed the points further.

accredited representative." Under Rule 21e.5 "[a] Passenger Engineer who may be subject to discipline and his duly accredited representative will have the right to be present during the entire investigation."

In fine, the Agreement clearly limited representation with regard to claims and disciplinary hearings. By its own terms and tenor, the BLE — and only the BLE — was entitled to represent a passenger engineer at a company-level disciplinary hearing. In an effort to deflect that exclusivity, the appellant challenges the legal validity of the contractual construct. He contends that the RLA overrides any deal which was struck between Amtrak and the BLE. We turn, then, to this assertion.

II.

The appellant makes much of the legislative history of the RLA. The archives of Congress show, he urges, that railroad employees historically enjoyed representation by minority unions in grievance matters, so the Act must be read in such a light. But, this allegation collapses under its own weight. Landers supports it principally by reference to the testimony of two witnesses who appeared before a House committee over half a century ago regarding possible amendments to the RLA. This duo, Commissioner Eastman and Mr. Harrison, lobbied for amendments which never saw the legislative light of day. *See* Hearings of House Committee on Interstate and Foreign Commerce on Railway Labor Act Amendments, H.R. Rep. No. 7650,73d Cong., 2d Sess. 44, 89 (1934). The changes that these witnesses advocated (giving employees the right to choose their own representation during grievance proceedings) were rejected. Rather than helping Landers, the fact that such changes were thought necessary by the proponents of elective (minority union) representation is itself formidable evidence that the RLA conferred no such right. And, the revisions that did eventuate in 1934 are of scant comfort to the stance of the present

plaintiff. Our review of the matter discloses that there were two major purposes of these amendments: (1) to protect an employee's freedom to join his preferred union, and (2) to create the Board, thereby providing an effective (nonjudicial) means for the settlement of grievances and other "minor disputes."[3] *See* H.R. Rep. No. 1944, 73d Cong., 2d Sess. 1-3 (1934). Neither of these ends are subserved in any direct way by an inflexible rule that opens company-level grievance proceedings to participation by minority unions.

We note, as well, that the current version of the statute does not contain the wording proposed unsuccessfully in 1934, or anything reasonably equivalent to it. Thus, far from assisting the plaintiff's cause, the Eastman/Harrison testimony and its aftermath suggest that Congress never accepted the notion of elective representation in grievance proceedings at the company level. In short, the legislative history of the RLA fails to furnish any decisive insights. We must look to the language of the statute itself without any conclusive behind-the-scenes guidance.

Landers lays special stress on 45 U.S.C. § 153, First(j), which, in respect to proceedings before the Board, provides that "[p]arties may be heard either in person, by counsel, or by other representatives, as they may respectively elect. . . ." On close perscruta-

[3]In RLA parlance, a "minor dispute" is typically "one concerning the resolution of grievances regarding the interpretation or application of existing collective bargaining agreements." *Railway Labor Executives' Association* v. *Boston & Maine Corporation*, 808 F.2d 150, 152 n.1 (1st Cir. 1986). If, for instance, the appellant was contesting the interpretation or application of the Agreement, his remonstrance would constitute a "minor dispute," thus subject to the grievance procedure, and ultimately to arbitration. But, Landers concedes that the appellees are correctly interpreting the Agreement. He says that, since the admitted interpretation abridges his rights under the RLA, a court has jurisdiction to consider the *validity* of the clause. In this, the appellant is correct.

tion, the initial promise of that allocution remains unfulfilled.

There is a world of difference between proceedings at the company level and those (more mature) proceedings which have reached the Board. The RLA recognizes the distinction, as does the caselaw. As the Eighth Circuit has observed: "In investigations, conferences or hearings by or before officers of the carrier an existing legal contract [collective bargaining agreement] controls, whereas the procedure before the Board is controlled by the statute." *Butler* v. *Thompson*, 192 F.2d 831, 833 (8th Cir. 1951). At bottom, the appellant's reliance on § 3, First(j) of the RLA proves too much: Congress obviously knew how to employ language bestowing elective rights of representation upon workers, yet chose to do so only for hearings before the Board. In stark contrast to the largesse granted unequivocally by § 3,First(j), the draftsmen stated merely that resolution of minor disputes at the company level would be handled in the "usual manner." 45 U.S.C. § 153, First(i). The fact that Congress eschewed conferment of a specific right of elective representation in § 153, First(i), directly preceding § 153, First(j), forcefully imports the absence of any intent to mandate such a rule at the company level.

The appellant also cites 45 U.S.C. § 152, Second, to the effect that "[a]ll disputes between a carrier . . . and its . . . employees shall be considered . . . in conference between representatives designated and authorized so to confer . . . by the carrier . . . and by the employees thereof interested in the dispute." Landers argues that this choice of phrase affords him a license to select his own union as his representative. We disagree.

Section 152, Second, spells out the overall duties of carriers, employees, and labor unions. It comprises a broadly general reference to the many kinds of controversies that might arise, not to specific procedures

or to particular rights in dispute resolution proceedings between parties. As the Supreme Court has declared, the statute "merely states the policy which . . . other provisions buttress with more particularized commands." *General Comm. of Adjustment of the Bhd. of Locomotive Engineers for the Mo.-Kan.-Tex. R.R.* v. *Missouri-Kan.-Tex. R.R.*, 320 U.S. 323, 334 (1943). *See also Edwards* v. *St. Louis-San Francisco Railroad Co.*, 361 F.2d 946, 953-54 (7th Cir. 1966) (to like effect). In the absence of some more particularized impartation of the right, we cannot find an anodyne such as Landers seeks in § 152, Second.

The appellant's quest for the elusive right to minority union representation at the company level finds no warmer welcome in the noninterference statute, which assures that

> [r]epresentatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other . . . .

45 U.S.C. § 152, Third.

The language of this section was intended to prohibit meddling by an employer with the majority's choice of a collective bargaining representative — not to enable an employee to pick his own (minority) union to counsel him at on-property disciplinary or grievance proceedings. *See* H.R. Rep. No. 1944, *supra*, at 2. There is nothing inconsistent between encouraging, on the one hand, freedom of choice among competing unions and requiring, on the other hand, that minor disputes at the company level be handled without recourse to "outside" unions.

Landers next adverts to § 152, Eleventh(c) as another source of his much-desired right to UTU representation. This proviso guarantees an employee the ability to satisfy all requirements of union membership by joining "any one of the labor organizations, national in scope, organized in accordance with this

chapter and admitting to membership employees of a craft or class in any of said services. . . ." 45 U.S.C. § 152, Eleventh(c). The appellant asseverates that entitlement to permissive representation by his union in disciplinary proceedings must ineluctably flow from this legislative protection of his right to join any qualified labor union in the first place. The conclusion, however, does not necessarily follow from the premise. Though we agree that representation by the union of one's choosing at a company-level hearing can be an important benefit of union membership, we do not find that § 152, Eleventh(c) conveys any such entitlement.

The sole aim of this statutory provision was to protect employees from being forced to join multiple unions — a clear danger in an industry in which workers shuttle time and again from employer to employer and from craft to craft. *Pennsylvania Railroad Co.* v. *Rychlik*, 352 U.S. 480, 489 (1957). As *Rychlik* teaches, "the only purpose of Section 2, Eleventh(c) was a very narrow one: to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changes crafts." *Id.* at 492. We endorse unreservedly the district court's reasoning on this point:

> The RLA accommodates a number of competing purposes. One purpose is to promote collective bargaining between members of a craft and the carrier by whom they are employed. In furtherance of that purpose, Congress provided that the union chosen by the majority of members of a particular craft employed by a carrier would represent all members of that craft in collective bargaining with that carrier. *See* 45 U.S.C. § 152, Sixth. But Congress also provided that, because of the peculiar nature of the railroad industry, including the frequent movement of employees among the different crafts, every member of a particular craft need not be

> required to belong to the union designated by the majority of the members of that craft. *See* 45 U.S.C. § 152, Eleventh(c). The RLA thus accommodates two sometimes conflicting interests — the interest in furthering collective bargaining for a craft as a whole and the interest in saving employees from the burden of frequent changes in union membership. Because the right to belong to the union of one's own choice arises in this special context of competing interests, that right may not automatically include subsidiary rights, such as the right of representation in company disciplinary hearings, that might otherwise be thought necessary and incidental.

Landers I, slip op. at 11.

We recognize that an employee has a legitimate interest in representation by his own union at disciplinary hearings. But, the union that is the collective bargaining agent for a class of employees likewise has a legitimate interest — perhaps a stronger, more salient, interest — in representing all members of the class. If a minority union achieved a formalized role in the process, the collective bargaining contract itself could be skewed by, say, collusive interpretation, or by the innocent advancement of positions contrary to the intent of the bargaining agent. And, an unscrupulous railroad could too easily play off the accredited representative against the miniority union, to undermine the status of both. So, the BLE — or any other "majority" union — has a considerable stake in the exclusive processing of disciplinary and grievance matters at the company level. As the Court remarked in the somewhat analogous precincts of the National Labor Relations Act,

> Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees.

Republic Steel Corp. v. *Maddox*, 379 U.S. 650, 653 (1965).

To the extent that provisions of the RLA, such as §§ 152, Sixth and Eleventh(c), appear to conflict with each other, we must interpret these provisions with a view toward the particular purposes undergirding both. Seen in this light, and in the context of the Act as a whole, § 152, Eleventh(c) cannot be read as implying an automatic right of elective (minority union) representation at company-level disciplinary hearings.

III.

We find the other statutory clauses hawked by Landers to be similarly unenlightening on this point. In our view, control of the protocol which infuses the handling of grievance or disciplinary matters of the sort here at issue is dictated by § 3, First(i) of the RLA, which provides that, at the company level,

> [t]he disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions ... shall be handled *in the usual manner* up to and including the chief operating officer of the carrier designated to handle such disputes; ....

45 U.S.C. § 153, First(i) (emphasis supplied).

In what is in some ways a spinoff of his version of the RLA's legislative history — a version which we have largely rejected, *see ante* Part II — Landers invites us to translate the statutory reference to the "usual manner" either as referring merely to the *procedures* habitually employed for processing grievances, or as a cryptic allusion to some code or pat-

tern of industry-wide practice which informs the RLA. In either event, he pleads that the "usual manner" of processing on-property grievances necessarily means processing them with the assitance of an affected employee's own union (minority status notwithstanding), *i.e.*, that the "usual manner" terminology does not affect the *substantive* rights created by § 2, Eleventh(c), including what Landers perceives as the right to representation by the union of one's choice. As discussed *ante* Part II, we find that the creation of that ostensible right was not one of the limited objectives which § 2, Eleventh(c) was designed to achieve. We likewise find that § 2, Eleventh(c) is not the repository of the representational rights envisioned by this appellant. Consequently, we disagree with Landers's (correspondingly) narrow interpretation of § 3, First(i). His arguments on this point fail to send a compelling signal.

Several cases have held that where there is a collective bargaining agreement in effect, the "usual manner" is determined by the provisions of the Agreement, and, absent more specific definition, by the (historical) standard practice within the given workplace or yard. *See Butler* v. *Thompson*, 192 F.2d at 833; *Switchmen's Union of North America* v. *Louisville and Nashville Railroad Co.*, 130 F. Supp. 220, 227 (W.D. Ky. 1955). *But see Taylor* v. *Missouri Pacific Railroad Co.*, 794 F.2d 1082 (5th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3425 (U.S. Dec. 15, 1986); *Coar* v. *Metro-North Commuter Railroad Co.*, 618 F. Supp. 380 (S.D.N.Y. 1985). Despite the divided authorities (discussed *post* at Part IV), we find the statute relatively clear. The phrase "usual manner" calls for no unusual mental gymnastics in matters of lexicography. Read naturally and in context, it refers unreservedly to the customary way ("usual manner") in which disputes have been resolved by a given railroad and its workforce. If Congress meant to incorporate into § 153, First(i) some mythic national custom or praxis, or to limit the "usual manner" to the pristine precincts of

pure procedure, it would simply have said so. The most plausible reading of this clause — the only reading which adequately explains its precise language and its juxtaposition with other statutory provisions — is that it adjusts itself, carrier-by-carrier, to fit the idiocratic contours of each and every line. The presence (or absence) of the opportunity to be represented by a minority union is one of these flexible adjustments.

The "usual manner" of dispute resolution, synthesized in this fashion, may restrict or enhance an employee's options relative to representation at company-level grievance or disciplinary proceedings. In contrast to § 153, First(j) — which assures an employee the right to the representation of his choice before the Board — there is, as we have mentioned before, no such statutory guarantee applicable to company-level proceedings. Where, as here, a collective bargaining agreement is in place, representation rights must be based upon, and may be limited by, that pact. *See United Steelworkers of America, Local 1913* v. *Union Railroad*, 648 F.2d 905, 911 (3d Cir. 1981) ("The procedures followed in an investigative hearing, including the representation to which an employee is entitled, are governed by the applicable collective bargaining agreement."); *Edwards* v. *St. Louis-San Francisco Railroad Co.*, 361 F.2d at 954 ("[W]hen a railroad employee questions the propriety of the initial hearing held on carrier property, his claim must be based on the provisions of the collective bargaining agreement relating to that subject.")

In this case, consistent with the RLA and with the Agreement, the district court correctly looked to the practices in vogue in the particular workplace. The history of the "usual manner" was relatively easy to compile. Amtrak was a virtual neophyte in the business; it did not begin employing passenger engineers directly until 1983. Under Rule 21 of the Agreement, quoted *ante* at 4, only the affected en-

gineer and the "duly accredited representative," *i.e.*, the designated official of the BLE, had the right to attend on-property hearings. The lower court found explicitly that "the usual manner of dispute resolution between Amtrak and its employees does not include the practice of representation of each employee by hiw own union." *Landers I*, slip op. at 14. Rather, Amtrak's "usual manner" was to allow only the collective bargaining agent to help employees at company-level disciplinary hearings. And, the convention was a consistent one. These findings have abundant record support as matters of *fact*. The resultant scenario did not in any way blunt the imperatives of the RLA. Thus, under the Agreement and the "usual manner" language of § 153, First (i), Landers had no basis for insisting that the UTU participate in his disciplinary hearing.

IV.

We readily acknowledge the existence of respectable authority tending to support the appellant's position. We have examined these precedents and have discarded them only after careful study. There is little in the caselaw, closely read, which suggests to us that Landers is on the right track.

The most formidable precedent favorable to the plaintiff is *Taylor* v. *Missouri Pacific Railroad Co.*, *supra*, where a panel of the Fifth Circuit concluded that the right of a railway worker to join the union of his choice — a right which, we agree, is guaranteed by the RLA — includes by necessary implication an entitlement to have that ogranization represent him at a company-level proceeding. *Taylor*, 794 F.2d at 1086. We resist the temptation to try to distinguish *Taylor*, and treat it as very much in point. But, we find its analysis of the central issue to be unpersuasive, and we decline to follow it.

We do not part company with so respected a tribunal lightly. We note, first, that the *Taylor* court, in its consideration of the pertinent provisions of the

RLA, apparently neglected to weigh 45 U.S.C. § 153, First(i) appropriately in the balance. The opinion in *Taylor* made not the slightest mention of the "usual manner" language, nor did it attempt to divine the "usual manner" of dispute resolution at the employer's yard at the time in question.[3] Congress, as we have pointed out, was explicit in distinguishing between proceedings at the company level and those conducted before the Board. *Compare id. with* 45 U.S.C. § 153, First(j). We find this distinction to be purposeful, convincing, and, in the case before us, ultimately controlling.

Moreover, to the extent that *Taylor*, 794 F.2d at 1085, relied on § 152, Eleventh(c) as the source of a perceived right to allow a worker to choose his own union to represent him, we find such reliance to have been mislaid (essentially for the reasons advanced in Part III hereof). This is especially so when one considers the extremely narrow purposes intended to be served by that statutory provision. *See Pennsylvania Railroad Co.* v. *Rychlik*, 352 U.S. at 492. *Taylor* also suffers from a further miscalculation: it leaned heavily on the decision of the Seventh Circuit in *McElroy* v. *Terminal Railroad Ass'n of St. Louis*, 392 F.2d 966

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[3]We have scrutinized, too, the relevant decision below, *see Taylor* v. *Missouri Pacific Railroad Co.*, 614 F. Supp. 1320 (E.D. La. 1985), and find no sign that the district court made any findings of fact whatever anent the "usual manner."

(7th Cir. 1968), *cert. denied*, 393 U.S. 1015 (1969). This is a burden which *McElroy* cannot bear.[4] Lastly, we remark that, perhaps because of its misconceptions about *McElroy*, *Taylor* seems to have overlooked earlier, more pertinent, Seventh Circuit precedent. *See, e.g., Broady* v. *Illinois Central Railroad Co.*, 191 F.2d 73 (7th Cir. 1951). *See also Edwards* v. *St. Louis-San Francisco Railroad Co., supra.* We think it is of considerable significance that the *McElroy* court, 392 F.2d at 971-72, rebuffed a fairly overt invitation to overrule these earlier cases.

Coar v. *Metro-North Commuter Railroad Co., supra*, comprises Landers's remaining heavy artillery. There, the district court found that membership in a minority union would be "meaningless" if engineers could not choose to have that union represent

[4] *McElroy* decided that a collective bargaining agreement between a railroad and the BLE did not bar a group of locomotive engineers from choosing another union (of which they were members) as their on-property representative for grievance purposes. 392 F.2d at 969. But, *McElroy* stemmed from "the unique situation presented ... where employees shuttle back and forth between their crafts," yet are represented by different unions in each craft. *Id.* at 971. In the case at bar, this situation did not obtain. The district court found "little or no shuttling between crafts by employees who work as passenger engineers for Amtrak." *Landers I*, slip op. at 15. Moreover, the parties stipulated that the BLE was the duly accredited representative for all crafts to which an Amtrak passenger engineer might conceivably transfer.

McElroy is also distinguisable in another critical respect: there, unlike here, the historical "usual manner" was amenable to the employees request. Prior to the inception of the exclusive collective bargaining agreement, the employer had regularly permitted locomotive engineers who were members of a minority union to be represented by that union in respect to company-level grievance and disciplinary problems. *Id.* at 968. Thus, the "usual manner" was to allow such representation. *Id.* at 969. In contrast, as we have noted in the text, the "usual manner" at Amtrak has been to permit only the collective bargaining representative to function in this capacity. Viewed in this light, *McElroy* reinforces — rather than undermines — our rejection of *Taylor*.

them in disciplinary proceedings. 618 F. Supp. at 383. As we have already explained, that is simply untrue. It would serve no purpose to reiterate our views on the subject, or to chart the exact ways in which *Coar* partakes of the weaknesses of *Taylor*.[5] Suffice it to say that, for the reasons mentioned, we regard *Coar*, like *Taylor*, to have fallen wide of the mark.

V.

Although the appellant has made other arguments, they are uniformly meritless. We hear no whistles blowing. And, nothing would be gained by a ritualistic calling of the roll. It is enough to say that the RLA does not give a railroad worker an automatic right to secure representation by his own (minority) union at an on-property grievance or disciplinary hearing. Put another way, the various provisions of the RLA, singly and in their ensemble, do not per se invalidate labor contracts which purport to limit on-property representational rights in grievance and disciplinary matters to duly accredited bargaining agents. *Accord Broady* v. *Illinois Central Railroad Co.*, 191 F.2d at 76 ("We can find no provision of the Railway Labor Act which gives to employees the right to a representative of their own choice at an investigation by company officials of a charge that the employee has violated company rules."); *Butler* v. *Thompson*, 192 F.2d at 833 (same). Read as a whole, we find the RLA to be clear and unambiguous in this regard, and we believe it represents a reasonable

[5] The core of *Coar* is particularly vulnerable because of its misplaced dependency on isolated excerpts from the legislative history of the RLA — passages which, as we have already pointed out, *see ante* at 5-7, cannot carry such cargo. Although *Coar* quotes Commissioner Eastman correctly, 618 F. Supp. at 384, the *Coar* court neglects to mention that the quoted remarks ere mere advocacy favoring a proposed amendment to § 2, Fourth — an amendment which was defeated rather than enacted. *Taylor*, which perfunctorily accepted *Coar's* view of the legislative history, 794 F.2d at 1086, suffers from the same infirmity.

compromise of the centrifugal and centripetal forces which are at work in cases such as this.

We conclude, as did the district court, that Landers's right to representation by the UTU at the company level was governed by the Agreement and thus by the "usual manner" of dispute resolution between Amtrak and its passenger engineers. The court's fact-based determination that the "usual manner" prevalent at this workplace did not involve representation by a union other than the "majority" union — the collective bargaining agent — was not clearly erroneous. And the Agreement — which, when construed in this fashion, prohibited the appellant from being assisted by the UTU at the February 1984 hearing — was not in derogation of any provision of the RLA. Landers need not join the BLE; but, unless and until the Agreement or the "usual manner" is changed, he and others similarly situated must forego representation by their own (minority) union at the initial stages of grievance and disciplinary proceedings.

The judgment of the district court is, therefore,

Affirmed.

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APPENDIX B:

JUDGMENT OF COURT OF APPEALS

No. 86-1776.

PAUL G. LANDERS
Plaintiff, Appellant,
v.
NATIONAL RAILROAD PASSENGER CORP., *et al.*,
Defendants, Appellees.

JUDGMENT

Entered: March 24, 1987

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

_____
Clerk.

[cc: Messrs. Miller, Ross and Ms. Moorhead]

APPENDIX C:

MEMORANDUM OPINION OF DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PAUL G. LANDERS,
Plaintiff
v.
NATIONAL RAILROAD PASSENGER CORPORATION, and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Defendants

CIVIL ACTION
NO. 84-467-K

Memorandum
June 24, 1986

Plaintiff, a passenger engineer employed by defendant National Railroad Passenger Corporation ("Amtrak"), and a member of the United Transportation Union ("UTU"), alleges a violation of his rights under §§ 2 and 3 of the Railway Labor Act, 45 U.S.C. §§ 152, 153 ("RLA"), by defendants Amtrak and the Brotherhood of Locomotive Engineers ("BLE"). Plaintiff claims that his rights under the RLA were violated when he was not permitted to be represented by his own union, the UTU, at an internal company disciplinary hearing. A non-jury trial was held and, after all parties had completed their evidentiary offerings, oral argument was held on April 2, 1986. The parties having made their post-trial submissions, all of the parties' contentions are now before me for decision.

I.

As a threshold matter, the defendants contend that this court is without subject matter jursidiction to hear plaintiff's claim. Defendants submit two bases for this contention.

First, defendants contend that plaintiff's claim raises only a "minor dispute" over which this court has no jurisdiction. Under the RLA, federal district courts have jurisdiction only over "major" disputes. 45 U.S.C. § 156. "Minor" disputes are not properly before a district court judge and must be settled by statutorily prescribed arbitration processes. 45 U.S.C. § 153. *Carbone* v. *Meserve*, 645 F.2d 96 (1st Cir. 1981); *Airline Stewards and Stewardesses Association* v. *Caribbean Atlantic Airlines*, 412 F.2d 289 (1st Cir. 1969). A major dispute "relates to the formation or modification of the collective agreement." *Carbone*, 645 F.2d at 98. A minor dispute "contemplates an existing agreement and relates 'to the meaning or proper application of a particular provision with reference to a specific situation or an omitted case.' " *Id.* (quoting *Elgin, J., & E. Ry.* v. *Burley*, 325 U.S. 711, 723 (1945)).

In this case plaintiff claims that the agreement reached between the BLE, the collective bargaining representative for Amtrak's passenger engineers, and Amtrak violates the RLA because it provides that the BLE shall be the exclusive representative of all Amtrak passenger engineers, whether or not they are members of the BLE, at internal company disciplinary hearings. The collective bargaining agreement at issue was entered into on October 26, 1982, by the BLE and Amtrak and became effective on January 1, 1983. Rule 21 of that agreement provides that at company disciplinary hearings and company appeal hearings, a passenger engineer may be represented by "his duly accredited representative." Rule 1(c) defines "duly accredited representative" as follows: "the General Chairman of the Brotherhood of Locomotive Engineers having jurisdiction or any elected officer of the Brotherhood of Locomotive Engineers designated by the General Chairman."

Defendants characterize plaintiff's claim as a dispute over who may properly be a "duly accredited

representative." Because, defendants contend, the dispute is thus over the interpretation of a term in the agreement, it is a "minor" dispute.

This contention is without merit. Amtrak and the BLE interpret the agreement as providing that the BLE is to be the exclusive representative of passenger engineers in disciplinary hearings. Plaintiff does not dispute that this interpretation is the correct one. He concedes that under the agreement, the BLE is to be the exclusive representative. Indeed, it is this exclusivity that he is challenging. Plaintiff does not argue that he has a right under the existing agreement to have a different representative. Instead, he argues that under the existing agreement as both sides agree it should be interpreted, his rights under the RLA are violated. Because plaintiff is not challenging defendants' reading of the provision, but the permissibility of their having agreed to the provision, his challenge does not fall into the category of disputes over contract interpretation which are to be resolved only by administrative processes. As the court concluded in *Taylor* v. *Missouri Pacific Railroad Co.*, 614 F. Supp. 1320, 1322 (E.D. La. 1985), when faced with the identical issue, "Since the issue is one of validity, not interpretation, it is for judicial consideration. *See Felter* v. *Southern Lacific Co.*, 359 U.S. 326, 327 n.3 (1959); *Order of Railway Conductors & Brakemen* v. *Switchmen's Union of North America*, 269 F.2d 726 (5th Cir. 1959)."

II.

Defendants contend also that this court is without subject matter jurisdiction because the dispute in this case represents a jurisdictional battle between two unions, the BLE and the UTU. In support of this contention, defendants rely principally on *General Committee* v. *Southern Pacific Co.*, 320 U.S. 338 (1943), in which the Supreme Court held that the federal courts had no jurisdiction to resolve a dispute between two unions over whether one of the two unions

could, as the collective bargaining representative for a particular craft, agree with the carrier that it would be the exclusive representative in grievance hearings for employees in that craft, even if those employees were members of the other union. Although plaintiff in this case raises the same issue — the validity of an exclusive representation agreement — that was raised in *General Committee* v. *Southern Pacifc Co.*, that case is not dispositive of the jurisdictional problem raised here.

In *General Committee* v. *Southern Pacific Co.*, The Supreme Court held that where one *union* challenged the validity of an exclusive representation agreement into which another union had entered, the federal courts had no jurisdiction. The Court held that under § 152, Ninth a challenge of this kind could only properly be made in proceedings before the National Mediation Board ("Mediation Board").

The Supreme Court expressly declined to decide, however, whether a similar challenge made by an individual employee would be justiciable: "Whether different considerations would be applicable in case an employee were asserting that the Act gave him the privilege of choosing his own representative for the prosecution of his claims is not before us." 320 U.S. at 344.

I conclude that this jurisdictional question, expressly left open by the Court in *General Committee* v. *Southern Pacific Co.*, should be resolved in favor of justiciability.

The Supreme Court has long made clear that the federal courts have a role in enforcing the commands of the Railway Labor Act. *See Virginian Railway Co.* v. *System Federation No. 40, et al.*, 300 U.S. 515 (1937); *McElroy* v. *Terminal Railroad Association of St. Louis*, 392 F.2d, 966, 968 (7th Cir. 1968), and cases cited therein. That role is limited considerably by the various provisions of the RLA that place certain kinds of disputes arising under the Act within the

exclusive jurisdiction of the National Railroad Adjustment Board ("NRAB") or the Mediation Board. This dispute, however, does not fall into any of the several categories of disputes that have been assigned to the administrative domain for resolution. It is not a "minor" dispute over which only the NRAB has jurisdiction, nor a jurisdictional contest between unions over which only the Mediation Board has jurisdiction. I conclude, therefore, that plaintiff's claim of rights under the RLA raises a dispute that this court may entertain. *See McElroy, supra* (claim that employee is entitled under RLA to be represented by his own union in grievance proceedings rather than the union that is the collective bargaining representative for his craft does not raise either a "minor" dispute over contract interpretation or a jurisdictional dispute between unions; the court thus has jurisdiction over the claim); *Taylor, supra* at 1322 (same); *Coar* v. *Metro-North Commuter Railroad Co.*, 618 F. Supp. 380, 381-82 (S.D.N.Y. 1985) (same).

III.

Defendants offer a third reason that this court should not hear plaintiff's claim. Defendants contend that because plaintiff did not exhaust his administrative remedies, he is barred from bringing this action in federal court.

The events that gave rise to the instant suit are as follows: In February 1984 Amtrak filed disciplinary charges against Landers for failure to comply with certain operating and safety rules while on duty. A hearing was held on these charges at which, over his objection, the BLE represented plaintiff. After the hearing, plaintiff was assessed with a thirty-day suspension. Plaintiff served his suspension and did not appeal the hearing decision. On February 21, 1984, plaintiff commenced this suit.

Defendants contend that because plaintiff failed to appeal his claim that he had been wrongfully denied his right to have the UTU represent him, he is

barred from raising that claim here. In support of this contention, defendants cite a number of opinions by the NRAB — the administrative body to whom plaintiff could have appealed — in which the NRAB decided questions relating to employee's rights of representation at disciplinary hearings.

I conclude that plaintiff's failure to appeal is not a bar to this action for the same reason I concluded that the issue in this case is not a minor dispute. The issue here is purely one of statutory interpretation: whether the RLA prohibits the kind of exclusive representation clause included in the BLE-Amtrak agreement. Because the question is the validity of the contract, not its interpretation, it is for the court, not the administrative process, to resolve.

The NRAB decisions cited by defendants are for the most part in accordance with this distinction. Most of the decisions deal with the interpretation of a particular contract — they concern, for example, what the term "duly accredited representative" means as used in a particular contract. *E.g., Brotherhood of Railroad Signalmen* v. *The Long Island Rail Road Company*, Award No. 21237 (3rd Division Sept. 28, 1976). Although some of the decisions make reference to the requirements of the RLA, *e.g., Order of Railway Conductors* v. *Norfolk and Western Railway Company*, Award No. 16973 (1st Division. March 18, 1955), nothing in the Act requires that an agrieved employee raise statutory claims with the NRAB rather than in a federal court. I conclude that the issues of statutory interpretation raised by plaintiff in this action are not the type of issues to which the administrative exhaustion requirements of the RLA apply. Plaintiff's failure to exhaust thus does not act as a bar to this action.

In conclusion, I reject defendants' arguments that this court should dismiss this case for want of subject matter jurisdiction or failure to exhaust administrative remedies. I thus turn to plaintiff's substantive contentions.

IV.

In support of his contention that under the RLA an employee has a right to be represented by his own union in company grievance hearings, plaintiff relies principally on three provisions of the Act. First, plaintiff points to § 152, Second which delineates the "general duties" of carriers and employees in all disputes. Section 152, Second reads,

> All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Plaintiff contends that the language "representatives designated . . . by the employees thereof interested in the dispute" confers a right on the employee interested in a particular disciplinary dispute to designate his own representative. Although plaintiff's reading of § 152, Second is plausible, I conclude that it is not the correct one.

Section 152, Second is a general statement of the responsibilities of carriers and employees for resolving disputes. The section thus applies to the many different kinds of disputes that may arise either between a group of employees and the carrier or an individual employee and the carrier. Various other provisions of the Act delineate how a representative is to be designated for a particular purpose. For example, § 152, Fourth provides

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter.

Thus, the method for designating the representative

for collective bargaining purposes is majority vote by those employees "interested" in the bargaining.

Another example is § 153, First(j) which provides that parties appearing before the NRAB in certain disputes "may be heard either in person, by counsel, or by other representatives, as they may respectively elect." An employee interested in a grievance hearing before the NRAB thus may designate any representative he or she chooses.

The circumstance that various provisions specify how representatives are to be chosen with respect to particular disputes suggests that the general language of § 152, Ninth does not create particular rights in this regard on behalf of "employees . . . interested in the dispute." I thus conclude that this section alone does not create the right asserted by plaintiff. In order to prevail he must point to some more particular support in the statute for his asserted right.

V.

Plaintiff relies also on § 152, Eleventh (c) which guarantees that each employee may belong to the union of his or her choice. That is, an employee is not required to belong to the union that represents his or her craft in collective bargaining with the carrier. Plaintiff argues that the right to be represented by his own union in disciplinary hearings before his employer is a necessary incident of his right to belong to that union. In support of this argument, plaintiff cites language from three cases in which an employee or employees challenged an exclusive representation agreement. *McElroy*, *supra*, *Coar*, *supra*, and *Taylor*, *supra*. In those cases the courts held that the right to representation by one's own union in grievance hearings followed "logically," "implicitly" and "clearly" from the right to membership in that union. *See respectively McElroy*, 392 F.2d at 972; *Coar*, 618 F. Supp. at 382; *Taylor*, 614 F. Supp. at 1324.

With all respect to these courts, I must disagree

with their conclusion that the right of representation in internal company disciplinary proceedings necessarily flows from the right of membership.

The RLA accommodates a number of competing purposes. One purpose is to promote collective bargaining between members of a craft and the carrier by whom they are employed. In furtherance of that purpose, Congress provided that the union chosen by the majority of members of a particular craft employed by a carrier would represent all members of that craft in collective bargaining with that carrier. *See* 45 U.S.C. § 152, Sixth. But Congress also provided that, because of the peculiar nature of the railroad industry, including the frequent movement of employees among the different crafts, every member of a particular craft need not be required to belong to the union designated by the majority of the members of that craft. *See* 45 U.S.C. § 152, Eleventh(c). The RLA thus accommodates two sometimes conflicting interests — the interest in furthering collective bargaining for a craft as a whole and the interest in saving employees from the burden of frequent changes in union membership. Because the right to belong to the Union of one's choice arises in this special context of competing interests, that right may not automatically include subsidiary rights, such as the right of representation in company disciplinary hearings, that might otherwise be thought necessary and incidental.

Without question an employee has a strong interest in having his own union represent him in a disciplinary hearing. It is likely that he has chosen that union because it is the one in which he has most confidence, or the one with which he is most familiar. Disciplinary hearings are matters of great importance to an employee, and it is clear that he has an interest in being accompanied at that hearing by the union that he believes can provide him with the best representation.

The union that has signed the collective bargaining agreement, as well as its member and other nonmember employees within that craft, also have an interest, however. The courts and commentators have long recognized that the resolution of particular grievances and disciplinary actions will have a profound effect on the way a collective bargaining agreement is administered because those individual resolutions will become the precedents by which later disputes are decided. *See, e.g., Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965); Cox, *The Duty To Bargain Collectively During the Term of an Existing Agreement*, 63 Harv L. Rev. 1097, 1100 (1950) (in the context of the National Labor Relations Act, "Contract negotiations are the legislative process of collective bargaining; the day-to-day working out of plant problems is its administrative or judicial aspect .... To exclude the bargaining representative from the processing of grievances, or to admit a minority union, is also an unfair labor practice."). In *Republic Steel* v. *Maddox*, in which the National Labor Relations Act was the controlling statute, the Supreme Court wrote

> Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract.

379 U.S. at 653.

Because the competing interests of collective-bargaining-representative unions and of craft-members who are not members of that union must both be accommodated by the Act, I conclude that Section 152, Eleventh (c) cannot be read to include an automatic right of representation. Because the right to membership in a union does not alone guarantee the right to representation by that union, I conclude that plaintiff's claim of this latter right can succeed only if there exists some other more specific statutory provision creating that right.

VI.

Plaintiff relies finally on § 153, First (i), which reads,

> (i) The disputes between an employee or group of employees and a carrier or carries growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

Plaintiff contends that the "usual manner" for handling disputes includes the representation of each employee by his own union.

Defendants contend that, unlike the circumstances in *McElroy*, the "usual manner" of grievance resolution between the parties to this case does not include any such representation.

Although the language of the statute itself does not compel the conclusion that the term "usual manner" refers to the "usual manner in which, as a factual matter, a particular carrier and its employees have resolved their disputes," the parties on both sides assume that this is the proper definition. *McElroy* also uses the term in this way. Because this is a common sense reading of the term as used in this section and because no indication that any different meaning was intended has been brought to the court's attention, I conclude that the term "usual manner" should be understood as referring to the usual manner in which disputes have been resolved by a particular carrier and its employees.

I find that the usual manner of dispute resolution between Amtrak and its employees does not include the practice of representation of each employee by his own union.

Amtrak, as a relatively new carrier, did not begin employing passenger engineers directly until January 1, 1983. The collective bargaining agreement at issue in this case, including the provision for exclusive representation by the BLE of passenger engineers in company disciplinary hearings, has been in effect since that time. Under that agreement, the practice has consistently been to allow only the collective bargaining agent to act as an employee's representative. Although plaintiff has pointed to a small number of isolated incidents where that practice was not followed, I find that these exceptions are too rare even to approach establishing representation by an employee's own union as the "usual manner" of dispute resolution.

The fact that representation by an employee's own union is not the usual manner of dispute resolution between Amtrak and its passenger engineers distinguishes this case from *McElroy*. In that case a practice of representation by an employee's own union had developed, in part because employees "shuttled" back and forth between different crafts. That is, at times they worked in a craft for whom their own union was the bargaining representative and at other times in a craft for whom a different union was the bargaining representative.

In contrast, there is little or no shuttling between crafts by employees who work as passenger engineers for Amtrak. Although Amtrak passenger engineers have a semi-annual option to transfer to Conrail as passenger engineers, they would continue to be represented by the BLE in this position. Only a relatively small number of employees have exercised this option. Passenger engineers who do exercise this option do not shuttle between two crafts represented by

two different unions but between two crafts represented by the same union.

Once an Amtrak engineer has transferred back to Conrail, he could under certain circumstances move into the lower ranking position of fireman. Firemen at Conrail are represented by the UTU. Thus, it is possible that plaintiff could in some circumstances work in a craft represented by the UTU. The likelihood of such a development, under the evidence before the court, is so remote that it cannot be said that a true "shuttling" situation exists as that term is used in the case law.

Moreover, this possibility of transfer between crafts at Amtrak has not resulted in a practice of representation by an employee's own union. By contrast, in *McElroy* the court determined that there had long been a practice whereby employees who shuttled between crafts could be represented by their own union even where the grievance arose while working in the craft for which their union was not the bargaining representative. It was the deviation from this usual manner that occurred when one union signed an exclusive representation agreement of which plaintiffs complained in *McElroy*. The Seventh Circuit based its ruling that the exclusive representation agreement was impermissible largely on the facts of that case: the practice of shuttling between crafts and the long-standing practice of representation by an employee's own union. Indeed, in *McElroy* the Seventh Circuit declined to overrule *Broady* v. *Illinois Central Railroad Co.*, 191 F.2d 73 (7th Cir. 1951), *cert. denied*, 342 U.S. 897, in which on different facts it had refused to invalidate an exclusive representation agreement: "[That case] did not involve the unique situation here where employees shuttle back and forth between their crafts." *McElroy*, 392 F.2d at 971.

Thus, I conclude that plaintiff cannot prevail on his argument that he has a right to be represented by his own union because that is the usual manner in

which disputes have been resolved by Amtrak and its passenger engineers.

VII.

In summary I conclude that plaintiff has pointed to nothing in the statute or the facts of this case that establishes a right to tuse the UTU as his representative in internal company disciplinary hearings. In addition to this absence of any affirmative source of this asserted right, there is another provision that supports the conclusion that the statute did not create such a right. In contrast with § 153, First (i), which provides that disciplinary and grievance hearings at the company level will be handled in the "usual manner," § 153, First (j) provides that for those disputes that are appealed from the company level to the NRAB,

> (j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

It is apparent from § 153, First (j) that Congress was quite able to specify what rights of representation a party to a dispute might have. Congress' failure to make any specific provision for rights of representation at the company level in the section directly preceding § 153, First (j) which makes explicit provision for such rights at the NRAB level suggests strongly that Congress did not mean to establish such rights for the first level of dispute resolution. *See Butler* v. *Thompson*, 192 F.2d 831, 833 (8th Cir. 1951) (rejecting a claim that despite the contrary language of the collective bargaining agreement, he should be allowed to

have his own union represent him in grievance hearings and emphasizing the distinction between § 153, First (i) and § 153 First (j): the former provides that the collective bargaining contract governs proceedings at the company level; the latter provides that the statute itself governs proceedings at the NRAB level).

For all of the reasons stated above I conclude that plaintiff cannot prevail on his claim that the Amtrak-BLE agreement is invalid under the RLA because it does not permit him to be represented by his own union in internal company disciplinary hearings.

ROBERT E. KEETON
United States District Judge

APPENDIX D:

ORDER ENTERED BY DISTRICT COURT

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

PAUL G. LANDERS, *Plaintiff*

v. CIVIL ACTION

NATIONAL RAILROAD PASSENGER CORPORATION, and BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Defendants* No. 84-467-K

ORDER
June 24, 1986

For the reasons stated in the Memorandum of this date, it is ORDERED:

The collective bargaining agreement signed by defendants Amrtrak and BLE on October 26, 1982, insofar as it prohibits plaintiff from being represented by his own union, the UTU, at company disciplinary hearings, does not violate the RLA.

Judgment for defendants, with costs.

ROBERT E. KEETON
United States District Judge

APPENDIX E:

STATUTES INVOLVED

Section 159(a), Title 29, United States Code, provides:

(a) Exclusive representatives — Employees adjustment of grievances directly with employer. Representatives designated or selected for the purposes of collective bargaining by the majority of the employeers in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

Section 152, Title 45, United States Code, provides:

First. Duty of carriers and employees to settle disputes. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference be-

tween representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives. Representatives, for the purposes of this Act shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other con-

tributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act [enacted May 20, 1926], then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives; time; place; private agreements. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: And provided further, That nothing in this Act shall be construed to supersede

the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules or working conditions contrary to agreement or to section 156 forbidden. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

Eighth. Notices of manner of settlement of disputes; posting. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives; designation By Mediation Board; secret elections. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated the authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for

the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. Violations; prosecutions and penalties. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States [United States attorney] to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: Provided, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union security agreements; check-off. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted —

(a) to make agreements requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership,

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class

of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties), uniformly required as a condition of acquiring or retaining membership, Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, first (h) of this act [45 USCS § 153(h), First division] defining the jurisdictional scope of the first division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this act and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement

applicable to him: Provided, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs fourth and fifth of section 2 of this act in conflict herewith are to the extent of such conflict amended.

Section 153 First(i), Title 45, United States Code, provides:

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

Section 153 First(j), Title 45, United States Code, provides:

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

Section 153 Second, Title 45, United States Code, provides:

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral

person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day, named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

OPPOSITION

BRIEF

No. 86-2037

In the Supreme Court of the United States

October Term, 1986

PAUL G. LANDERS,
Petitioner,

vs.

NATIONAL RAILROAD PASSENGER CORPORATION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS

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QUESTION PRESENTED FOR REVIEW

Does the Railway Labor Act, 45 U.S.C. §§151 *et seq.*, permit provisions in the governing collective bargaining agreement which limit union representation in company-level proceedings to the craft-designated collective bargaining representative?

PARTIES INVOLVED

Petitioner is Paul G. Landers, the plaintiff-appellant below. Respondents are the National Railroad Passenger Corporation, which is also known as Amtrak, and the Brotherhood of Locomotive Engineers.

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No. 86-2037

In the Supreme Court of the United States

October Term, 1986

PAUL G. LANDERS,
Petitioner,

vs.

NATIONAL RAILROAD PASSENGER CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the First Circuit

MEMORANDUM FOR RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT

The statements contained in the petition are essentially correct. However, respondent Brotherhood of Locomotive Engineers ("BLE") notes, as did the opinion below (Pet. App. 12a),[1] that respondent National Railroad Passenger Corporation ("Amtrak") was created by the Rail Passenger Service Act in 1970, 45 U.S.C. §§541 *et seq.*, but did not employ passenger engineers or, in fact, any operating employees until January 1, 1983. Shortly prior to 1983, Amtrak entered into a labor contract with BLE, which is the collective bargaining representative for the

1. References to "Pet. App." followed by the suffix "a" are to the appendix to the petition

craft of passenger engineers on Amtrak.[2] This agreement contains a rule specifying that only the employee and the duly designated official of BLE have the right to attend disciplinary hearings and to process claims and grievances through carrier-level proceedings. A similar rule appears in the Amtrak labor contracts with the United Transportation Union ("UTU"), the union to which petitioner belongs and in which he holds office. Amtrak has consistently applied the exclusive representation rule with BLE, so that no passenger engineer employed by it can have a minority or rival union, including UTU, represent that employee in any company-level proceedings.

The district court in a memorandum decision entered on June 24, 1986, held that nothing in the Railway Labor Act ("RLA") or in the facts of the case give petitioner Landers an unqualified right to representation in company-level grievance and disciplinary hearing proceedings by a union other than BLE as the bargaining representative. (Pet. App. 32a). In affirming this decision, the court of appeals found that the legislative history of the 1934 amendments to the RLA did not support petitioner Landers' contention that the Act "opens company-level grievance proceedings to participation by minority unions," (*id.*, 4a-5a); refused to interpret the various sections of the RLA relied upon by Landers "as implying an automatic right of elective (minority union) representation at company-level disciplinary hearings" (*id.* at 10a); rejected as distinguishable, inapposite or in conflict with prior well-reasoned authority and the legislative history of the 1934 RLA amendments, the decision of the Seventh Circuit in *McElroy v. Terminal Railroad Ass'n of St. Louis*, 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 1015 (1969),

2. Since March 11, 1986, BLE also has been craft representative for firemen and hostelers (engine attendants) on Amtrak and assumed UTU's exclusive representation rule for that craft.

and the decision of the Fifth Circuit in *Taylor v. Missouri Pacific Railroad Co.*, 794 F.2d 1082 (5th Cir. 1986), *cert. denied*, ... U.S. ....., 93 L. Ed. 2d 721 (1986) (Pet. App. 13a-15a); and further found that federal labor policy sanctions the legitimate interest of the collective bargaining representative in representing all members of the craft, thereby eliminating any opportunity for the employer to undermine the status of the accredited collective representative and, quoting from this Court's opinion in *Republic Steel Co. v. Maddox*, 379 U.S. 650, 653 (1965), "complement[ing] the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract." (Pet. App. 9a-10a). Based upon this reasoning, the Court of Appeals for the First Circuit said:

> We conclude, as did the district court, that Landers' right to representation by the UTU at the company level was governed by the Agreement and thus by the "usual manner" of dispute resolution between Amtrak and its passenger engineers. The court's fact-based determination that the "usual manner" prevalent at this workplace did not involve representation by a union other than the "majority" union —the collective bargaining agent—was not clearly erroneous. And the Agreement—which, when construed in this fashion, prohibited the appellant from being assisted by the UTU at the February 1984 hearing—was not in derogation of any provision of the RLA. Landers need not join the BLE; but, unless and until the Agreement or the "usual manner" is changed, he and others similarly situated must forego representation by their own (minority) union at the initial stages of grievance and disciplinary proceedings. (*Id.* at 17a.)

DISCUSSION

This submission is made in support of the petition for a writ of certiorari. Although respondent BLE believes that the court of appeals' decision in this case is correct, that decision involves a question of law which is significant for review and should be determinatively settled by this Court. If the petition is granted, BLE would urge affirmance of the decision below.

For almost twenty years since the decision in *McElroy v. Terminal R.R. Ass'n of St. Louis*, 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 1015 (1969) ("McElroy"), railroad management and labor, particularly the labor organizations representing operating employees (i.e., locomotive engineers, firemen, trainmen, conductors, switchmen), have lacked express guidance on the question of whether the RLA, 45 U.S.C. §§151 *et seq.*, makes unlawful a provision in a labor agreement limiting union representation in grievance handling under that agreement to the craft-designated collective bargaining representative. In *McElroy*, the Seventh Circuit held that the railway employees involved could process their grievances themselves or through a minority union and, therefore, concluded an exclusive grievance representation provision in the labor contract violated the RLA. In reaching this conclusion, that court relied heavily upon the facts that the involved employees shuttled back-and-forth between crafts with different bargaining agents and that the usual and customary handling of their grievances, at least up to negotiation of the exclusive representation rule, permitted those employees to be represented by the collective bargaining representative or a minority union.

The decision in *McElroy* was in conflict with the rulings under Section 9(a) of the National Labor Relations Act, 29 U.S.C. §159(a). *Hughes Tool Company v. NLRB*, 147 F.2d 69 (5th Cir. 1945); *Federal Telephone and Radio Co.*, 107 N.L.R.B. 649 (1953); *contra, Douds v. Local 1250*, 173 F.2d 764, 772 (2d Cir. 1949). *See also Broniman v. Great Atlantic & Pacific Tea Co.*, 353 F.2d 559 (6th Cir. 1965), *cert. denied*, 384 U.S. 907 (1966); *Black-Clawson Co. v. International Ass'n of Machinists*, 313 F.2d 179 (2d Cir. 1962), holding that the employer need not entertain grievances presented by the employee or others because Section 9(a) is permissive only. The *McElroy* ruling also contravened certain prior decisions under the RLA which established that railroad employees in the so-called nonoperating crafts were not entitled to representation in company-level proceedings by an attorney or an official of a union other than the designated craft representative. *E.g., D'Elia v. New York, New Haven & Hartford R. Co.*, 338 F.2d 701 (2d Cir. 1964), *cert. denied*, 380 U.S. 978 (1964); *Broady v. Illinois Central R. Co.*, 191 F.2d 73 (7th Cir. 1951), *cert. denied*, 342 U.S. 897 (1951); *Butler v. Thompson*, 192 F.2d 831 (8th Cir. 1951).

Several cases subsequent to *McElroy* appear to have read that decision as complying with the freedom of union choice policy expressed in the RLA and, therefore, suggest that any extension of the exclusivity of bargaining representation to include company-level grievance and disciplinary proceedings may be illegal under the RLA. *See, e.g., Taylor v. Missouri Pacific R. Co.*, 794 F.2d 1082 (5th Cir. 1986), *cert. denied sub nom., United Transportation Union v. Taylor*, ____ U.S. ____, 93 L. Ed. 2d 721 (1986). Two cases involving the same factual situation, the identical legal issue, and generally the same parties

before the Court are also making their way through the judicial stream. In *Coar v. Metro-North Commuter R. Co.*, 618 F. Supp. 380 (S.D. N.Y. 1985), that district court followed *McElroy* and *Taylor, supra*, and failed to consider the factors relied upon by the court of appeals in this case and read the legislative history of the 1934 amendments to the RLA differently. A decision on a petition for reconsideration and rehearing awaits the action of this Court. Moreover, there is currently pending on motions for summary judgment before the United States District Court for the District of Columbia a case entitled *John D. Peters and United Transportation Union v. National Railroad Passenger Corp. and Brotherhood of Locomotive Engineers*, Civil No. 83-3431. These cases present the potential for conflicting judgments and a waste of judicial resources unless this Court exercises its supervisory powers.

Under these circumstances, a definitive ruling upon the rights of employees under the RLA to the selection of a representative in grievance handling and at disciplinary proceedings would prove beneficial to rail management and the railway unions, along with the employees working in that industry, and would serve to bring some measure of stability to the collective bargaining relationships in the railway industry. Most importantly, this case is an appropriate vehicle to present that issue. The decision below was based upon a complete evidentiary record and thoroughly develops the legal and factual underpinnings for the conclusion reached. The factual situation is such that it would give the Court an opportunity to explore all facets of a troublesome problem to the railroad industry and its employees—a legal problem that should be finally resolved and placed to rest.

CONCLUSION

Respondent Brotherhood of Locomotive Engineers submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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OPPOSITION

BRIEF

No. 86-2037

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

PAUL G. LANDERS,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT NATIONAL RAILROAD PASSENGER CORPORATION'S BRIEF IN OPPOSITION

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November 7, 1987

QUESTION PRESENTED

May a carrier agree with the union which is the representative of a craft or class of employees that another union may not represent an employee in pre-arbitration disciplinary proceedings or grievances, even though the employee involved in the grievance is permitted under Section 2, Eleventh (c) of the Railway Labor Act to satisfy the union security clause of the collective bargaining agreement by paying dues to the other union?

RULE 28.1 LIST

1. Paul G. Landers - plaintiff-appellant below.
2. National Railroad Passenger Corporation (Amtrak) - defendant-appellee below.
3. Brotherhood of Locomotive Engineers - defendant-appellee below.

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No. 86-2037

IN THE
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NATIONAL RAILROAD PASSENGER CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT NATIONAL RAILROAD PASSENGER CORPORATION'S BRIEF IN OPPOSITION

Respondent National Railroad Passenger Corp. ("Amtrak") respectfully requests that this Court deny the petition for a writ of certiorari submitted by Paul G. Landers seeking review of the First Circuit's decision in this case.

COUNTERSTATEMENT OF THE CASE

Petitioner is employed by Amtrak as an engineer. The engineers' craft is represented by the Brotherhood of Locomotive Engineers ("BLE"). Petitioner was allowed by a narrow provision of the Railway Labor Act ("RLA"), however, to pay dues to another union, the United Transportation Union ("UTU"). He challenges the fact that he was not permitted to be represented by UTU in the pre-arbitration stages of a disciplinary proceeding. Amtrak consistently has allowed only the official union representative of the craft to represent any employee in pre-arbitration proceedings. In addition, Amtrak did not have any practice of intercraft mobility underpinning the provision of the RLA allowing dues payment to a minority union.

Statutory Framework of the Railway Labor Act

This action arises under the Railway Labor Act 45 U.S.C. § 151 *et seq.*, which was adopted in 1926 and substantially amended in 1934 to govern labor relations on the nation's railroads.

The RLA was agreed upon by carriers and unions and embodies a "basic congressional policy of self-adjustment of the industry's labor problems between carrier organizations and effective labor organizations." *IAM v. Street*, 367 U.S. 740, 759 (1961). The purpose of the RLA is to assure the free selection of majority representatives who can engage in the peaceful dispute-resolution procedures specified in the Act, and thus avoid labor strife which otherwise could disrupt interstate commerce. *See generally, Brotherhood of Railroad*

Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 377-78 (1969). One majority union represents all employees systemwide and there can be no minority representation. *Virginian Railway Co. v. System Federation*, 300 U.S. 515 (1937); *Switchmen's Union v. NMB*, 320 U.S. 297 (1943).

The RLA in sections 5 and 6, 45 U.S.C. §§ 155-56, provides explicit procedures for collective bargaining and resolution of disputes arising out of the collective bargaining agreement with the exclusive employee representative. *See Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711, 723-25 (1945). Section 3, 45 U.S.C. § 153, provides equally explicit procedures to resolve so-called "minor" disputes over discipline, grievances, or the interpretation or application of collective bargaining agreements. *Id.* Section 3 provides for a federally funded agency, the National Railroad Adjustment Board, to arbitrate minor disputes; alternatively, it provides that individual unions and carriers can establish a "Public Law Board" or "System Board" to conduct formal arbitration proceedings. Before the parties to a minor dispute engage in formal arbitration, however, RLA Section 3 provides that minor disputes go through a preliminary resolution process. They "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes . . ." 45 U.S.C. § 153(i). After failure to reach agreement in these pre-arbitration procedures on the carrier's property, minor disputes may be submitted by either party to formal arbitration at the National Railroad Adjustment Board, Public Law or System Board. During formal arbitration, the Act guarantees that employees may be represented by anyone they choose.

The RLA as originally enacted forbade compulsory unionism. In 1951, however, Congress added RLA Section 2, Eleventh which authorized union shop agreements if certain conditions were met. Section 2, Eleventh (c) was added at that time to address a unique problem among railroad employees in the operating crafts (engineers, firemen, trainmen, yardmen, switchmen and hostlers). In the railroad industry, operating employees had a long tradition of job progression from one craft to another. They retained seniority in more than one craft, and frequently moved from one craft to another and returned. Section 2, Eleventh (c) allows railroad operating employees to satisfy a union shop clause by paying dues to any union national in scope, not just to the union representing the craft in which they are working at a particular moment. Section 2, Eleventh (c), thus avoids a situation where an operating employee would have to belong to more than one union or frequently change union membership. *Pennsylvania Railroad v. Rychlik*, 352 U.S. 480, 492 (1957).

The RLA guarantees that the designated representative of a craft must represent all employees in the craft fairly and without discrimination. This duty applies whether or not the employee is a member of the union. *Tunstall v. BLFE*, 323 U.S. 210 (1944); *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 202 (1944).

The Dispute Between Amtrak and Landers

Amtrak, a railroad newly-created in 1970, did not employ operating employees until January 1, 1983.[1] The craft of engineers of Amtrak is represented by the Brotherhood of Locomotive Engineers ("BLE"). Effective January 1, 1983, Amtrak and BLE entered into a collective bargaining agreement that provided progressive steps for resolving minor disputes culminating in arbitration. The agreement provided that during the pre-arbitration phases of the dispute procedure, an engineer could be represented only in person or by BLE. The United Transportation Union ("UTU"), which represented the craft of firemen and hostlers at Amtrak, had virtually identical minor dispute procedures in its collective bargaining agreement, including representation by UTU alone during pre-arbitration proceedings.

Petitioner Landers was hired by Amtrak as an engineer on January 1, 1983. At Amtrak, unlike many traditional railroads, operating employees had no dual seniority in more than one craft and there was no possibility of mobility between the engineers' craft and any other craft. Nevertheless, Landers chose to exercise his statutory right not to pay dues to BLE, and instead paid dues to UTU.

Landers was charged with misconduct in February 1984. At the company-level investigatory hearing, Landers asked to be represented by UTU. In accordance with the collective bargaining agreement and the consistent practice at

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1 Until 1982, Amtrak subcontracted operating employees from other carriers.

Amtrak, UTU was not allowed to appear on his behalf. Landers was disciplined with a 30 day suspension. He chose not to appeal the discipline to a formal arbitration proceeding where he would have been allowed to be represented by UTU. Instead, Landers brought suit against Amtrak and BLE in the District Court for the District of Massachusetts, alleging that his rights under the RLA were violated because the union in which he held membership was not allowed to represent him at the company-level proceeding. The district court found in the circumstances presented that Landers had no right to be represented in pre-arbitration proceedings by a union other than the collective bargaining representative of the craft.

The First Circuit's Decision

Affirming the District Court, the First Circuit reasoned that the controlling statutory language was RLA Section 153(i), which provides that pre-arbitration proceedings are to take place in the "usual manner" at a particular carrier. The court found that since Amtrak was a new carrier with no tradition of inter-craft mobility, which clearly had never allowed representation at company levels by any minority union, Amtrak and BLE lawfully could prohibit UTU representation at the company level. Moreover, the First Circuit found a national labor policy favoring exclusive representation by a majority union. The First Circuit held that RLA Section 2, Eleventh (c) should not be expanded to guarantee a right to be represented in company-level grievance proceedings by a minority union, but should be construed narrowly to apply only to union security clauses.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The First Circuit's Decision That A Carrier And Union May Permit An Employee To Be Represented Only By The Official Union Representative In Pre-Arbitration Proceedings Does Not Raise An Important Issue Requiring This Court's Attention

The narrow issue in this case could have no significant impact upon the rights of those few employees who conceivably could be affected at all. The extremely limited nature of this case is shown by the following points.

Few Employees Could Be Affected

The universe of those who conceivably could be affected by the First Circuit's decision includes only railroad employees in the operating crafts. These are the only employees who are granted a right in RLA Section 2, Eleventh (c) to fulfill the requirements of a union security clause in a labor agreement by paying dues to any union national in scope, instead of paying dues to the union which represents their craft. The universe is further constricted because the decision could apply only to those members of the operating crafts who, in fact, exercise their right to belong to a union other than the union which represents the craft.

Few Railroads Could Be Affected

The holding of this case could apply only in a situation where the usual manner of handling grievances on a railroad property has been to allow the official representative

of the craft to be the only union to process grievances at the lower levels of the grievance process. The First Circuit premised its holding upon the fact that Amtrak was a new railroad which had employed operating employees only for fourteen months before Lander's disciplinary proceeding took place. Amtrak has no tradition of intercraft mobility -- the problem which led to the enactment of Section 2, Eleventh. Even more significantly, the uniform rule at Amtrak, unlike many of the older railroads, had been to disallow minority union participation at the lower stages of the grievance proceeding.[2] The First Circuit premised its holding on the language in RLA Section 153(i) which allows lower level arbitration proceedings to proceed in the "usual manner." Therefore, the holding could not affect the rights of operating employees who belonged to a minority union at railroads other than Amtrak where the manner of handling grievances over the years had been to allow minority union representation.

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2 For example, the UTU stated in its petition to this Court seeking a writ of certiorari to the Fifth Circuit in UTU v. Taylor, No. 86-642, "Traditionally, in the industry and at MOPAC engine service employees have seniority both as engineers and as firemen and work either job as the need and seniority required or permitted . . . In accord with this practice, traditionally either the engineers craft union (BLE) or the firemen's union . . . (UTU) could handle any engine service employee's grievance regardless of which engine service craft worked by the employee." Brief page 4 (October 20, 1986) (attached hereto as Appendix A).

Employee's Right To Be Represented By Minority Union At Arbitration Is Not Affected

The holding could not restrict a minority union member's right to have the minority union represent the employee at the actual arbitration proceeding. It is only at the preliminary investigation and pre-arbitration proceeding upon the property that the minority union is excluded. It was never contested in *Landers* that the minority union member may have anyone he chooses represent him at the formal arbitration before the National Railway Adjustment Board or a System or Public Law Board.

Employee's Right To Be Represented Fairly In Pre-Arbitration Proceedings Is Protected

Even though the employee joins a union other than the one designated to represent his craft, the craft representative nevertheless has the duty to represent the employee fairly. *Tunstall v. BLFE*, 323 U.S. 210 (1944); *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944). This duty extends to all aspects of representation, including negotiation of collective bargaining agreements and representation of covered employees in disciplinary or grievance proceedings at all levels.

Employee's Right Under Section 2, Eleventh Is Not Affected

The holding does nothing to undercut the explicit protection afforded by Section 2, Eleventh (c), namely, to protect an employee in the operating crafts who may move between two crafts from having to pay dues to two unions.

Moreover, the "right" of an employee to meet union shop requirements as guaranteed by Section 2, Eleventh (c) is not rendered meaningless by the *Landers* decision. The chosen union will have complete representation rights during any periods of time when the employee is working in the craft represented by that union, and, even while working in the craft represented by another union, the chosen union can represent the employee in a formal arbitration proceeding.

Exclusivity In Grievance Handling Does Not Give One Union An Advantage Over Another

Finally, this case does not present an important question because the First Circuit decision will affect UTU and BLE and any other operating unions evenly and without discrimination. For example, Landers' union, UTU, would enjoy the same representation rights in regard to the Amtrak firemen and hostlers it represented as BLE would have for the engineers' craft. Another example is UTU's position in *Taylor v. Missouri Pacific Railroad Co.*, 794 F.2d 1082 (5th Cir.), *cert. denied*, 107 S.Ct. 670, (1986). There, UTU was the official representative of the Switchmen's craft but Switchmen who were BLE members were attempting to have BLE represent them in grievances. Landers' representative herein, the UTU, argued to this Court for the reverse of the rule it now seeks. UTU stated:

> In short, the authority to bargain collectively is exclusive; exclusivity is a policy imposed to foster stable labor relations; since collective bargaining includes grievance handling with the employer,

> exclusivity should attach here as well so as to comport with the policy of the law and ensure stable labor relations in grievance handling.

Petition at 7-8 (attached hereto as Appendix A).[3] The fact

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3 UTU relied upon Professor Archibald Cox's opinion:

> In *Rights Under a Labor Agreement*, 69 Harv.L.Rev. 601 at 625 (1956), Cox says:
>
> . . .Through the prosecution of grievances, it [the union which is the duly designated bargaining representative] can daily demonstrate its effectiveness as the guardian of the employees' interests; successful settlement builds bonds of loyalty from those benefitted; and refusal to process underscores the union's authority. Conversely, grievances settled with unions or other unions make the majority union appear unnecessary if not ineffective and creates conflicting loyalties. More importantly, the union, as representative of all the employees, has a collective interest in the individual's claim. If the claim is granted, it may be at the expense of other employees -- seniority, promotion, and job assignment cases are only the most obvious examples. If the claim is denied, it may provide a precedent which casts a cloud over other employees' rights. The union has not only an interest but a responsibility to protect the other employees' rights. In addition, it has a separable institutional interest that the bargain it has made not be remade or frittered away by individual actions. . . .
>
> Professor Cox expresses this view in 61 Harv.L.Rev. 1 at 302 (1947):
>
> . . .Unless the majority representative may object to a proposed settlement, moreover, and carry the grievance up through the contract procedure to the next higher step, there will be created a "source of competitions and discriminations that could be destructive of the entire structure of labor relations in the plant". Ability to circumvent the majority representative in the handling

that UTU reverses its position, depending on whether it is the majority or the minority representative, shows that there is no advantage to any union or to the scheme of labor relations in allowing minority union representation.

In sum, this case presents a comparatively insignificant question because it affects very few employees, on very few carriers. The effect the case has on any individual is slight, because employees still would have the right to join a minority union and be represented by a minority union in arbitration. The only context where operating employees would have to be represented by an official majority union would be in contract negotiation and in grievance proceedings at the company level. Even in that situation, minority union members' rights are protected because the majority union has the duty to represent them fairly whether or not they are members.

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of grievances would be a constant encouragement to the development of splinter groups and raiding by outside unions. . .

UTU Petition for certiorari at 10-11.

II. The Decision Below Is Consistent With Decisions Of This Court And Any Inconsistency With Decisions Of Other Courts Of Appeals Does Not Require This Court's Attention

The First Circuit's decision is consistent with this Court's reasoning in *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965), that a majority union needs the exclusive right to process grievances and disciplinary matters at the company level:

> Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees.

While *Maddox* was decided under the NLRA, Lander's union has admitted that the same reasoning applies under the RLA. *See* UTU Brief Opposing Certiorari in *Taylor*, attached hereto as Appendix A. Moreover, the First Circuit's decision in *Landers* is consistent with this Court's decisions that the majority union has a duty to represent all employees fairly, even non-members. *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 202 (1944).

The import of these Supreme Court cases cannot be altered by RLA Section 2, Eleventh (c), because this section was meant to deal only with a limited problem of compulsory unionism. Thus, the First Circuit's decision also is consistent

with this Court's decision in *Pennsylvania Railroad v. Rychlik*, 352 U.S. 480, 492 (1957), that Section 2, Eleventh (c)'s "only purpose . . . was a very narrow one: to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changes crafts."

Petitioner asserts that certiorari must be granted because the courts of appeals are divided on the issue at bar. The conflict among the circuits is largely illusory. The Seventh Circuit in *McElroy v. Terminal Railroad*, 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 1015 (1969), relied upon by Petitioner, is not at odds with the First Circuit's decision because *McElroy* dealt only with a specific fact pattern where employees shuttled back and forth between crafts, and the usual manner of handling grievances arguably permitted minority union representation. Similarly, *Taylor v. Missouri Pacific Railroad Co.*, 794 F.2d 1082 (5th Cir.), *cert. denied*, 107 S.Ct. 670 (1986), arose in a factual context of intercraft mobility and is thus distinguishable. Another decision by the Seventh Circuit and decisions by other Courts of Appeals are consistent with the *Landers* decision. *See Broady v. Illinois Central Railroad Co.*, 191 F.2d 73 (7th Cir. 1951), *cert. denied*, 342 U.S. 897 (upholding exclusive representation agreement); *Butler v. Thompson*, 192 F.2d 831 (8th Cir. 1951) (no provision of RLA gives employees right to representative of their choice at company level).

In any event, the Petitioner's reliance on *Taylor*, which in turn relies upon *Coar v. Metro-North Commuter Rail Co.*, 618 F. Supp. 380 (S.D.N.Y. 1985), is misplaced.

As the First Circuit points out in *Landers*, these courts did not fully probe the legislative history and statutory scheme of the RLA which underlie the question at bar. In particular, as the First Circuit points out, these decisions rest upon a mistaken reading of a particular segment of legislative history, wherein two advocates of minority union representation argue in favor of an amendment which would grant minority unions the right to represent their members in pre-arbitration proceedings. The *Taylor* and *Coar* courts did not realize, as discerned by the First Circuit in *Landers*, that the amendments which these advocates sought were rejected by Congress. Consequently, the *Taylor* and *Coar* courts have reasoned from an incomplete and inaccurate presentation of legislative history.

In addition, the First Circuit explores more thoroughly than other courts RLA Section 153(i), which provides that grievances on the property will be decided in the "usual manner." As the First Circuit points out, this is the one provision of the RLA which directly addresses the question of what procedure shall govern the pre-arbitration stages of a grievance proceeding. Yet the Fifth Circuit in *Taylor* did not even mention Section 153(i) or analyze its bearing on the question. Respondents respectfully submit that the Supreme Court's review is not necessary at this point to resolve any alleged conflict between the First and Fifth circuits because the Fifth Circuit's opinion rests upon inaccurate and incomplete analysis. Since the First Circuit already has probed these errors in its exhaustive and well reasoned opinion, other courts which address the issue in future will be able correctly to resolve the issue.

Accordingly, Supreme Court review is not warranted. The First Circuit decision is in accord with all prior Supreme Court cases on the rights and duties of representatives and the scope of RLA Section 2 Eleventh (c), and does not merit this Court's attention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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APPENDIX

IN THE

Supreme Court of the United States

October Term, 1986

No. 86-

UNITED TRANSPORTATION UNION,
Petitioner,

v.

W.G. TAYLOR, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner United Transportation Union (hereinafter, "UTU") respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review and, upon review, to reverse the decision by that Court in *Taylor, et al.* v. *Missouri Pacific Railroad Co., et al.*, 794 F.2d 1082 (5th Cir. 1986)

OFFICIAL REPORTS OF DECISIONS BELOW

Taylor v. *Missouri Pacific Railroad Company*,
794 F.2d 1082 (5th Cir. 1986),
affirming 614 F.Supp. 1320 (E.D. La. 1985)

The Court of Appeals opinion is Appendix A attached hereto.

JUDGMENT OR DECREE SOUGHT TO BE REVIEWED

The judgment or decree sought to be reviewed is that of July 23, 1986 in the United States Court of Appeals for the Fifth Circuit. Jurisdiction here is pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The pertinent statutory provisions are in Sections 1-3 of the Railway Labor Act, 45 U.S.C. §§ 151-153. A copy of Sections 1-3 is attached hereto as Appendix B.

JURISDICTION

Jurisdiction in the District Court was pursuant to 28 U.S.C. § 1331 and § 2201 regarding enforcement of the provisions of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

I. STATEMENT OF THE CASE

This action was brought for enforcement of the Railway Labor Act, 45 U.S.C. § 151, *et seq.* ("RLA"), and a declaration of rights thereunder. Plaintiffs-Respondents are four individuals employed by Defendant-Petitioner Missouri Pacific Railroad Company ("MOPAC") as switchmen, and one labor organization, the Brotherhood of Locomotive Engineers ("BLE"). They brought suit complaining that the labor agreement between Defendants-Petitioners UTU and MOPAC covering the switchmen craft for which the UTU is the RLA craft collective bargaining representative, unlawfully limits union handling of switchmen grievances at the company level to the UTU. Plaintiffs-Respondents claim that MOPAC switchmen have a right under the RLA to have the BLE, a separate labor organization and representative for the MOPAC engi-

neers craft, handle switchmen grievances. They claim in the present suit that the MOPAC-UTU contract, to the contrary, is unlawful under the RLA. The four individual Plaintiffs-Respondents held membership in the BLE while employed as switchmen under the UTU contract with MOPAC.

MOPAC moved to dismiss the Complaint on the ground of lack of subject matter jurisdiction or the exclusivity of the National Mediation Board ("NMB") or mandatory arbitration forums. Plaintiffs-Respondents and the UTU moved for summary judgment on the merits. In an Opinion filed March 20, 1985 and by final Order filed August 8 and entered August 9, 1985, the District Court noted that it had jurisdiction and granted Plaintiffs'-Respondents' Motion for Summary Judgment, declaring the MOPAC-UTU switchmen contract unlawful insofar as union grievance handling for switchmen at company-level proceedings was limited to the UTU. The District Court held the contract to this extent to be in violation of the RLA. 614 F.Supp. 1320 (E.D. La 1985). An appeal was taken, and the United States Court of Appeals for the Fifth Circuit affirmed the District Court. 794 F.2d 1082 (5th Cir. 1986).

II. STATEMENT OF FACTS

The facts here are generally as stated in the opinions below and are not in dispute. See, also, the O.B. Sayre Affidavit that was before the District Court and is Appendix C hereto.

Plaintiffs-Respondents are four individuals employed by MOPAC and one labor organization, the BLE, craft representative for MOPAC engineers. Defendant MOPAC is a "carrier" within the meaning of the RLA. The UTU is a labor organization representing employees primarily in the railroad industry. The UTU represents MOPAC switchmen, as well as MOPAC conductors and brakemen. These three crafts are generally known as "train service" crafts. The UTU generally represents these train service crafts, as well as firemen, in the

railroad industry. The BLE generally represents engineers in the industry. The engineers and firemen crafts are referred to as "engine service" crafts. The UTU-MOPAC contract for switchmen covering Plaintiffs-Respondents at the New Orleans Terminal provided that, as to handling grievances at the company level, the UTU was the exclusive union representative. The pertinent contract clauses so stating and so interpreted by the parties are set out in the Appendix to the District Court's March 20, 1985 "Order and Reasons". These exclusivity provisions had been in place for many years. The current agreement is, on its face, a 1974 "reprint". 614 F.Supp. at 1325-1327.

Taylor, et al.[1] were employed as MOPAC switchmen at the New Orleans Terminal. At one time, Plaintiff Taylor had worked as an engineer. Switchmen have only an opportunity of first choice to move to engine service crafts, and there is no routine or significant movement between engine service and train service, including the switchmen's crafts. Traditionally, in the industry and at MOPAC engine service employees have seniority both as engineers and as firemen and work either job as the need and seniority required or permitted. See *General Committee* v. *Burlington Northern, Inc.*, 563 F.2d 1279 (8th Cir. 1977); *McElroy* v. *Terminal Railroad Association*, 392 F.2d 966 (7th Cir. 1968). In accord with this practice, traditionally either the engineers craft union (BLE) or the firemen's union (BLFE (Brotherhood of Locomotive Firemen and Enginemen), after 1968 the UTU) could handle any engine service employee's grievance regardless of which engine service craft worked by the employee. No similar joint seniority practice has existed as between engine service and train service crafts such as switchmen.[1]

[1] A parallel practice existed within train service crafts before 1969 when there were multiple train service craft unions. See *O'Connell* v. *Erie Lackawanna R.R.*, 391 F.2d 168 (2d Cir. 1968); *Birkholz* v. *Dirks*, 391 F.2d 289 (7th Cir. 1968). With the formation of the UTU in 1969, there was only one train service union, the UTU.

In or about January, 1984, while working as switchmen, three of the four individual Plaintiffs-Respondents were subject to disciplinary investigation proceedings by MOPAC under the UTU switchmen contract. While Taylor, et al. were employed as switchmen, they held union membership in the BLE. Each sought to have a BLE representative handle his disciplinary investigation and grievance proceedings at the company level. MOPAC declined to allow such, based upon the existing contract provisions that limited switchmen discipline and grievance union representation to the UTU. 614 F.Supp. at 1321.

Based upon the foregoing facts not in dispute below, the District Court granted summary judgment to Plaintiffs-Respondents, invalidating the MOPAC-UTU contract insofar as it limited union representation in grievance handling thereunder at the company-level to the UTU. The United States Court of Appeals for the Fifth Circuit Affirmed.

III. THIS COURT SHOULD DECIDE THIS IMPORTANT ISSUE UNDER THE RAILWAY LABOR ACT: THE LEGALITY OF LIMITING COMPANY-LEVEL UNION GRIEVANCE HANDLING TO THE CRAFT COLLECTIVE BARGAINING REPRESENTATIVE.

The Fifth Circuit ruling decides an important question of federal law which has not been, but should be, decided by this Court. The question is that posed by this Petition, namely the legality under the RLA of the clause in the UTU-MOPAC agreement limiting Union representation in company-level grievance handling to the craft collective bargaining representative.

This is an important question of statutory interpretation under the RLA. The answer involves the judicial definition or reconciliation of two important statutory policies under the RLA, (1) the statutory policy of enhancing labor stability by according exclusivity to a duly designated collective bargaining representative and (2) the policy of employee choice in a

representative. The Court of Appeals, we believe, improperly construed the language and the policy and purposes of the Act.

A. The Important Labor Law Policy: Exclusivity And Stability In Collective Bargaining Is At Issue Here.

Exclusivity in collective bargaining representation and the stability derived therefrom has long been a central tenet of our federal labor laws. The RLA, first enacted in 1926, was this nation's first comprehensive collective bargaining law. Under that law, it was held by this Court that a covered employer must bargain with the craft labor representative when properly designated by a majority of the employees. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515 (1937). The statutory duty to treat with the majority designated union was an "affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other". Indeed, it was the very fact of this exclusivity of representation in collective bargaining that led this Court to impose a duty of fair representation upon the labor organizations. *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944). The Fifth Circuit recognized below that the authority to negotiate a contract was an exclusive authority ("... [T]he BLE switchmen are not entitled to have BLE negotiate a separate collective bargaining agreement for them ...." 794 F.2d at 1085), but rejected exclusivity for handling of grievances in enforcement of that contract. We believe this Court should review whether such exclusivity under the RLA extends to grievance procedure representation at the company level. (As we shall note later, grievance handling beyond the company level is specially treated in the statute and is not at issue here.)

Under the Railway Labor Act, the issue of representation in grievance handling has been before the lower federal courts in a variety of cases. Two cases that have expressed views contrary to the Fifth Circuit here are *Broady* v. *Illinois Central*, 191 F.2d 73 (7th Cir. 1951), and *Butler* v. *Thompson*, 192 F.2d 831 (8th Cir. 1951). Those two Circuits expressed the view

that there was no provision in the Railway Labor Act that afforded a right of free choice of a representative for company-level grievance representation. The Seventh Circuit, in *McElroy, supra*, permitted the firemen's union (BLFE) to represent engineers in engineer grievances under the engineer's union (BLE) contract, despite an exclusivity clause in that contract, but carefully distinguished *Broady* and *Thompson* as well as other cases on the special factual pattern—the "unique situation"—presented by the *McElroy* dispute, namely the long established historical pattern of cross-representation as between the two engine service crafts. That issue of multiple union representation in the two engine service crafts was not present in *Broady* or *Thompson*. As noted earlier here, that fact situation is peculiar to the engine service crafts.

More recently, two District Courts have split on this grievance handling issue under the Railway Labor Act. In *Coar* v. *Metro-North Commuter Railroad*, 618 F.Supp. 380 (S.D.N.Y. 1985), multiple union representation was permitted; in *Landers* v. *National Railroad Passenger Corporation*, C.A. No. 84-467-K (Memorandum, Order June 24, 1986), it was denied. (A copy of the unreported *Landers* opinion is Appendix D.) In *Landers*, Judge Keeton commented on the interest of the contract union in controlling grievance handling:

> The courts and commentators have long recognized that the resolution of particular grievances and disciplinary actions will have a profound effect on the way a collective bargaining agreement is administered because those individual resolutions will become the precedents by which later disputes are decided.

The *Landers* case is now on appeal to the First Circuit.

In short, the authority to bargaining collectively is exclusive; exclusivity is a policy imposed to foster stable labor relations; since collective bargaining includes grievance handling with the employer, exclusivity should attach here as well

so as to comport with the policy of the law and ensure stable labor relations in grievance handling.

The lower courts and the National Labor Relations Board have also recognized the process of handling grievances to be collective bargaining under the Labor Management Relations Act, 29 U.S.C. § 151, *et seq.* (LMRA), and, thus, an activity to which the rights and duties of exclusive representation apply. In *Ostrofsky* v. *United Steelworkers of America*, 171 F.Supp. 782 at 793 (D. Md. 1959), *aff'd. per curiam* 273 F.2d 614 (4th Cir.), *cert. denied*, 363 U.S. 849 (1960), the District Court, in referring to the significance of the disposition of individual grievances in the collective bargaining process, said:

> In the handling of grievances, as in the negotiation of the terms of an agreement, the interest of all employees are involved. The principal purpose of the grievance procedure is not to provide a framework within which individual desires and complaints can be taken up with the employer; rather it is to provide a framework within which the employees may bargain collectively to determine how the general principles of the agreement are to be applied to day-to-day problems.
>
> The settlement of each grievance—whether voluntarily or by arbitration—establishes a precedent which will usually be followed in subsequent cases.

Under the LMRA or its predecessor, the National Labor Relations Act, it has long been held that where there is a designated craft collective bargaining representative, another union has no right to handle grievances. Indeed, the employer has no duty to treat and is forbidden to treat with another union. *Federal Telephone and Radio Company*, 107 NLRB 649 (1953). That is part and parcel of the concept of a collective bargaining representative. Collective bargaining authority is exclusive authority; collective bargaining extends to grievance handling; therefore, grievance handling authority is within the collective bargaining representative's exclusive authority.

In *Hughes Tool Company* v. *NLRB*, 146 F.2d 69 (5th Cir. 1945), the Fifth Circuit itself rejected the claim that the employees had a right to have a non-contract union handle their grievances where there was a craft representative. And this claim was rejected in the face of explicit language in the NLRA at Section 9(a) at that time limiting the exclusivity of representation to allow employees to present their own grievances. Section 9(a) of the 1935 law (quoted in *Hughes Tool)* included a proviso limiting the general grant of exclusive representation to a union. It was stated:

> . . . any individual employee or group of employees shall have the right at any time to present grievances to their employer.

Hughes Tool rejected extending this, however, to a minority union presenting grievances on the employees' behalf. The Court noted that Congress had rejected a broadening of the proviso.

Indeed, later cases have held that the right of employees under Section 9(a) of the NLRA to present grievances is only permissive and does not bind the employer to hear them. The employer need not entertain the grievance. See *Broniman* v. *A&P Tea Co.*, 353 F.2d 559 (6th Cir. 1965); *Black-Clawson Co.* v. *Machinists*, 313 F.2d 179 (2d Cir. 1962).

While LMRA cases are not directly applicable, they serve to show the wide recognition given to the policy of exclusivity in grievance handling in federal labor law.

That this exclusivity in grievance handling provides stability in labor relations has long been recognized. Discussing this exclusivity issue as to grievance handling in an article titled *Collective Bargaining During The Contract*, 63 *Harv. L. Rev.* 1097, 1100 (1950), the eminent labor law scholar, Archibald

Cox, said:

> ... However narrowly it may canalize its course, the execution of a contract does not complete collective bargaining . . . . There will be ambiguities in the agreement to be clarified and gaps to be filled . . . . Contract negotiations are the legislative process of collective bargaining; the day-to-day working out of plant problems is its administrative or judicial aspect . . . . To exclude the bargaining representative from the processing of grievances, or to admit a minority union, is also an unfair labor practice.

Carrying this concept of grievances a bit further, Professor Clyde W. Summers of Yale University Law School, in *Individual Rights in Collective Agreements and Arbitration,* 37 *N.Y.U. L. Rev.* 362 (1962), said:

> Collective bargaining is a system of industrial government in which governing power is shared by two collective entities—union and management. The collective agreement, in the words of the Supreme Court, "calls into being a new common law" which the parties agree shall be the law of the plant during the terms of the agreement. Its explicit provisions and implied terms provide a framework of rules which guide and control the parties in developing their industrial common law through the grievance and arbitration process.

Professor Cox, like other students of labor management relations, strongly advocates that the collective bargaining representative should have complete control of grievances. In *Rights Under a Labor Agreement,* 69 *Harv. L. Rev.* 601 at 625 (1956), Cox says:

> ... Through the prosecution of grievances, it [the union which is the duly designated bargaining representative] can daily demonstrate its effectiveness as the guardian of the employees' interests; successful settlement builds bonds of loyalty from those benefitted; and refusal to process underscores the union's authority. Conversely, grievances settled with unions or other unions make the majority

> union appear unnecessary if not ineffective and creates conflicting loyalties. More importantly, the union, as representative of all of the employees, has a collective interest in the individual's claim. If the claim is granted, it may be at the expense of other employees—seniority, promotion, and job assignment cases are only the most obvious examples. If the claim is denied, it may provide a precedent which casts a cloud over other employees' rights. The union has not only an interest but a responsibility to protect the other employees' right. In addition, it has a separable institutional interest that the bargain it has made not be remade or frittered away by individual actions . . . .

Professor Cox expresses this view in 61 *Harv. L. Rev.* 1 at 302 (1947):

> ... Unless the majority representative may object to a proposed settlement, moreover, and carry the grievance up through the contract procedure to the next higher step, there will be created a "source of competitions and discriminations that could be destructive of the entire structure of labor relations in the plant". Ability to circumvent the majority representative in the handling of grievances would be a constant encouragement to the development of splinter groups and raiding by outside unions . . . .

While these judicial and scholarly opinions are offered in a variety of contexts, the underlying theme is that (1) exclusivity in collective bargaining representation is a major element in the stability of collective bargaining relations in industry; (2) grievance handling in the day-to-day enforcement of agreements is as important as the interpretation and negotiation process in collective bargaining; (3) it follows that generally the exclusive collective bargaining representative should, in the interest of stable labor relations, be the exclusive representative not only for purposes of negotiating and interpreting agreements, but for purposes of grievance handling as well, the day-to-day administration of the contract. The Fifth Circuit's ruling is at war with these basic policies of our federal labor laws.

In this regard, it should be noted that the undisputed evidence below was that there are approximately 13 national labor organizations on MOPAC. (Affidavit of O.B. Sayers, December 4, 1984, ¶2. See Appendix C.) This is the industry pattern. If the rule of the Court below succeeds so that an employee may have any union handle his grievance, it is not just the BLE and it is not just labor relations with respect to the switchmen that are potentially involved. All craft groups and contracts would be subject to claims to grievance handling from the 13 different unions where they obtain members in the craft. Indeed, the potential representative need not be a MOPAC union nor necessarily a union. If the statute allows choice in grievance handling, there is no basis to exclude particular choices. Thus, the policy issue is significant.

B. The Language Of The Railway Labor Act Has Not Been But Should Be Construed By This Court To Establish Exclusivity In Company-Level Grievance Handling And Certainly To Hold That The Statute Does Not Prohibit It.

The statutory language supports and does not bar exclusivity in grievance handling. Not only is there a very substantial policy in support of exclusivity in grievance handling, but the statutory language supports it. Most certainly the language of the Act does not preclude it. This Court should review that issue of statutory interpretation under the RLA.

Under the RLA, a labor union that is designated as the craft collective bargaining representative by the majority is deemed such *for all purposes under the Act*. That is the statutory language. This is the case whether the majority designation is made apart from or under NMB procedures. Under Section 2, Fourth, 45 U.S.C. § 152, Fourth, apart from NMB procedures, it is provided:

> The majority of any craft or class of employees shall hav the right to determine who shall be the representative o the craft or class *for the purposes of this Act*. (Emphasi added)

Under Section 2, Ninth of the Act, the statutory NMB designation process is established. Under Section 2, Ninth, the NMB i to handle disputes as to who or what is the designate representative. The NMB has responsibility to certify to th carrier those individuals or organizations "that have bee designated or authorized to represent the employees involve ...". (Section 2, Ninth, 45 U.S.C. § 152, Ninth) And:

> Upon receipt of such certification the carrier shall tre with the representative so certified as the representative o the craft or class *for purposes of this Act*. (Emphas added)

In both Section 2, Fourth and Ninth, the majority designates i craft collective bargaining representative, and that representative is such for purposes of the Act. It is not such just fo contract negotiation, but *for purposes of the Act*.

One of the purposes of the Act is certainly to regulate th handling of grievances as well as contract negotiation o interpretation. In 45 U.S.C. § 151a, the "General purposes" clause, one "purpose" identified is "to provide for the prompt and orderly settlement of all disputes growing out of grievance ...". 45 U.S.C. § 151a(5). At Section 2, First it is provided that carriers and employees are to "exert every reasonable effort" to "settle all disputes" manifestly including grievances. At Section 2, Second, "all disputes", which includes grievances are to be considered between representatives designated; at Section 2, Sixth it is the duty of the designated representatives to confer regarding grievances. In each of these four provisions of the law, it is plain that "grievance" handling is *one of the purposes of the Act* and specifically a task for the "designated representative". Thus, when, in Section 2, Fourth or Ninth, it is provided that the craft majority designated representative is the

representative "for purposes of the Act", absent clear language to the contrary, this must include grievance handling as well as contract negotiation or interpretation.

Section 2, Fourth and Ninth, as we have discussed them, were part of the 1934 amendments to the 1926 RLA. The 1934 amendments were an effort to improve the procedures for identifying the "designated or authorized representative" that had been referred to in the 1926 law. Even as to the 1926 law, it is manifest that the designated representative is the representative *for all purposes* under the Act. The 1934 amendments did not modify that basic concept of the 1926 law, but rather sought to improve the implementation. (H.R. Rep. No. 1944, 73rd Cong., 2d Sess. at 1, 2 (1934).

In the 1926 law, Section 2, Third was the only provision for protection of the process of choosing a representative. There it was provided:

> [r]epresentatives, for purposes of this Act, shall be designated by the respective parties . . .

without interference by the other. Then, in Section 2, Second and Fourth, were provisions concerning the duties of the representatives so designated.[2] Section 2, Second provided:

> All disputes . . . shall be considered . . . between representatives designated and authorized so to confer . . . .

Section 2, Fourth referred to grievances and provides that in disputes arising out of grievances or the interpretation or application of agreements:

> . . . it shall be the duty of the designated representative or representatives of such carrier and of such employees . . . to confer . . . .

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[2] Section 2, Fourth in the 1926 law became Section 2, Sixth in the law after the 1934 amendments.

Whether the reference be to the selection process (Section 2, Third) or the handling of disputes (Section 2, Second, "all disputes", or Section 2, Fourth, grievance disputes), the authority is the designated representative *for all purposes under the Act*. This was true under the 1926 Act, as well as the 1934 amendments.

Indeed, the 1934 amendments adding Section 2, Ninth underscored the exclusivity of the "designated representative". Section 2, Ninth provided not just for the NMB designation, but, as quoted above, that the carrier "shall treat" with the representative *for purpose of the Act*. In other words, the designated representative concept was not permissive. It was not just a grant of authority to the designated representative as one among many possible representatives. The carrier was required to deal—shall treat—with that designated representative. Section 2, Fourth and Ninth reflect that the majority designates the representative, and the carrier cannot interfere and *must* treat with that representative for all purposes under the Act, including grievances.

In the present case, the Court of Appeals said that ". . . no single provision of the Railway Labor Act [is] dispositive of this issue . . .". The Court of Appeals below supported its ruling primarily upon the statutory policy of employee free choice in selecting a representative, drawing upon some of the statutory provisions. The Court of Appeals noted among the general purposes of the RLA that of forbidding "any limitation upon freedom of association among employees". Other than that, the Court cited Section 2, Second and Section 2, Eleventh (c), 45 U.S.C. § 152 Second and Eleventh (c), as support for finding the policy of employee free choice sufficient in the law to serve to invalidate the agreement at issue.

With respect to the first of the three cited statutory provisions, one subparagraph of the "general purposes" clause at 45 U.S.C. § 151a(2), we believe the Court of Appeals misreads the quoted passage, and, in any event, it cannot

EDITOR'S NOTE

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sustain the burden the Court put upon it. The Court noted a general purpose of the law "(2) to forbid any limitation upon freedom of association among employees . . .". We suggest that any fair reading of the legislative history shows that that "general purpose" of free association was put into the law because of employer actions interferring with union organization.

The legislative history makes clear that the concern Congress addressed in 1934 in articulating the "free choice" policy in what became 45 U.S.C. § 151a, as well as in other sections of the law, was its concern that railroad management was interferring, by various improper means, with employee freedom of choice in designating craft majority representatives. This was the nature of the Congressional policy of employee "free choice" in both the 1926 law and the 1934 amendments.

In the 1926 law, there was protection of employee free choice. This was manifestly protection against employer interference. This appears at Section 2, Third of the 1926 law. There, it was stated:

> Representatives, for purposes of this Act, shall be designated by the respective parties . . . without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives *by the other*. (Emphasis added)

That was the only statutory expression in the 1926 law concerning protection of choice of union representative. It was clearly the intent and purpose of that law, insofar as employee union choice was concerned, to protect that choice from management interference. It had nothing to do with protecting a right of choice to a second union in grievance handling once a majority designated union representative has been properly chosen without management interference.

The 1934 amendments were no different in purpose and policy. By 1934 it had become apparent that insofar as the

employees were concerned, this right of the employees to choice of a union without management interference was being denied in two significant ways. Management was refusing to recognize the employees' choice of representaive and in various cases were supporting "company" unions. These were the two problems concerning employee free choice that were addressed by Congress in the 1934 amendments. The policy of the 1934 law as to free choice was a policy to protect that choice against abuses by carriers. This was no different than the 1926 law. The 1934 amendments merely sought to improve the enforcement of those policies. The 1934 amendments sought to provide a vehicle to assure that management would not unduly reject the employee representative's authority and further prohibited outright the company supported union as well as the so called "yellow dog" contract, a pre-employment extraction of non-union or union choice. This appears in both the House and Senate Reports on the 1934 amendments. (H.R. Rep. No. 1944, 73rd Cong., 2d Sess., at 1, 2; S. Rep. No. 1065, 73rd Cong., 2d Sess., at 1, 2) At page 2, the House Report succinctly states the problem as to free choice reflected in both the 1926 and the 1934 laws.

> 6. The Railway Labor Act of 1926, now in effect, provides that representatives of the employees, for the purpose of collective bargaining, shall be selected without interference, influence, or coercion by railway management, but it does not provide the machinery necessary to determine who are to be such representatives. These rights of the employees under the present act are denied by railway managements by their disputing the authority of the freely chosen representatives of the employees to represent them. A considerable number of railway managements maintain company unions, under the control of the officers of the carriers, and pay the salary of the employees' representatives, a practice that is clearly contrary to the purpose of the present Railway Labor Act, but it is difficult to prevent it because the act does not carry specific language in respect to that matter. This bill is designed to correct that defect.

There is no suggestion by Congress in 1926 or 1934 that it was addressing in any fashion whatever the matter of permitting employees to have a choice of union representatives for grievance handling after a collective bargaining representative is fairly chosen by the majority. The problem was management's coercion and interference.

No one disputes the importance of choice in regard to the selection of a union. But there is no basis upon which to conclude that the RLA, either in 1926 or 1934, sought to protect employee choice to multiple union grievance handling once a majority craft representative was fairly chosen. And it is further clear that choice as to which union will negotiate contracts is at least as, and indeed perhaps more important than, choice in grievance handling. Yet the central purpose of the 1926 law and the 1934 amendments was to provide that, once the majority has fairly chosen its representative, the employees no longer have a choice outside of the designated union except to change the designated union. Congress so limited this most important element of employee choice, and there is little basis to say Congress excepted grievance handling from the majority choice.

As noted, the Court of Appeals here specifically relied upon Section 2, Eleventh (c), 45 U.S.C. § 152, Eleventh (c), to support finding that employee choice overrides the exclusivity of the collective bargaining representative's status in regard to grievance handling. Here, again, however, the Court was wide of the mark. The employee's right to choice of union in Section 2, Eleventh (c) has a purpose as reflected in a very specific history, all of which has nothing to do with the circumstances involved here and in which the Court of Appeals invokes it.

In 1951, Congress amended the RLA to permit union shop agreements whereby employees could be compelled to become members of the designated representative union as a condition of employment. One exception to this was provided in Section 2, Eleventh (c) in regard only to operating craft employees

whereby membership in any one national union, as delineated in the exception, would satisfy a union shop clause. The purpose of this exception was described in *Pennsylvania Railroad Co.* v. *Rychlik*, 352 U.S. 480 (1957). *Rychlik* said, in pertinent part:

> . . . the sole aim of the [Eleventh (c)] provision was to protect employees from the requirement of dual unionism in an industry with high job mobility, and thus to confer on qualified craft unions the right to assure members employment security, even if a members should be working temporarily in a craft for which another union is the bargaining representative.

What was referred to was protection or assurance against the problem of dual unionism in the context of firemen-engineer, conductor-brakemen intercraft movement, a long-standing historical practice. The problem, as *Rychlik* reflects was that where there was substantial intercraft movement, such as between firemen-engineer, an employee might be unduly compelled by union shop agreements to belong to two unions or to change and abandon one. There was concern that Union "A" might not permit an employee to join the union if the employee maintained membership in Union "B". If "A" had a union shop clause, plainly this would imperil the employee's employment security. This is what the Court in *Rychlik* meant when it said that it might be "impossible" to belong to two unions. This is readily seen upon examination particularly of the legislative history cited at footnote 21 of *Rychlik*.

There was also concern that employees would have to incur the expense of two unions. The Court said dual union membership might be "expensive and sometimes impossible". There was further concern that even if the employee were to and could opt to change unions as he changed crafts, this could be complicated and might mean "the loss of seniority and union benefits". The union benefits would include such items as insurance for members. These were the concerns before Congress. See *Hearings Before the Committee on Interstate and*

Foreign Commerce House of Representatives, on H.R. 7789, 81st Cong., 2d Sess. (1950), and *Hearings Before a Subcommittee of the Committee on Labor and Public Welfare on S. 3295,* 81st Cong., 2d Sess. (1950), as cited in *Rychlik* at footnote 21. Those are the problems that *Rychlik* correcly shows Congress was concerned with in adopting the Section 2, Eleventh (c) proviso. These are the problems of "employment security" for which Section 2, Eleventh (c) was designed to give the employees assurance. There is no basis in the legislative history which is (outlined in *Rychlik*) to suggest that in enacting Section 2, Eleventh (c) there was any consideration given with respect to grievance handling. See, also, *O'Connell* v. *Erie-Lackawanna R.R.,* 391 F.2d 168 (2d Cir. 1968); *Birkholz* v. *Dirks,* 391 F.2d 289 (7th Cir. 1968). The protection of membership in Section 2, Eleventh (c) was designed to protect membership rights in regard to the limited cases where there was intercraft and thence inter-union movement, particularly engineer-firemen and, at that time, but no longer, conductor-brakemen. No intercraft movement obtains in regard to Plaintiffs in the instant case. *Rychlik* and the legislative history reflect that the Section 2, Eleventh (c) proviso had an important role to play that had nothing to do with grievance handling. There is no basis for the Court below to say that Section 2, Eleventh (c) protection relates to or supports multiple union grievance handling in this case.

Finally, the Court of Appeals below adverts to Section 2, Second, 45 U.S.C. § 152, Second, wherein it is said that "all disputes" shall be considered "between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute". 794 F.2d at 1086. The Court concludes that this reference to "representatives designated" is not limited to the craft chosen or craft designated representative. It refers as well, the Court said, to the "national union to which the employee belongs". While the Court said "national" union, there is nothing in Section 2, Second that remotely could create such a distinction.

Any union could then be the grievance union. Indeed, under the approach of the Court below, any entity, if designated, can be the representative. Once the statutory language of "designated representative" is cut loose from being limited to the craft designated representative, what justification is there in Section 2, Second for limiting the designated representative to a "national union"? There is none. (The limitation to a "national" union in Section 2, Eleventh (c) applies only to operating crafts and has no bearing on Section 2, Second.)

The statute does make one specific departure from the "designated representative" limitation on employee representation. The exception in substance proves the rule. That exception occurs in regard to handling cases at arbitration before the NRAB. At Section 3, First (j), 45 U.S.C. § 153, First (j), it is provided that the "parties", including an employee:

> . . . may be heard either in person, by counsel, or by other representatives, as they may respectively elect . . . .

Here is an explicit departure from the Section 2 "designated representative", and this Court has accordingly held that an employee is entitled to a choice of representative at NRAB arbitrations. *Elgin, Joliet & Eastern Ry. Co.* v. *Burley,* 325 U.S. 711 (1945), *opinion adhered to on rehearing,* 326 U.S. 801 (1946); see, also, *Estes* v. *Union Terminal,* 89 F.2d 768 (5th Cir. 1937). Here Congress intended to permit departure from the designated representative, and it was so stated. Where no such exception has been suggested for grievance handling on the railroad property, the rule of exclusive representation ought to remain in place.

Further, the Court of Appeals' reliance on *McElroy* v. *Terminal Railroad Association,* 392 F.2d 966 (7th Cir. 1968), *cert. den.* 393 U.S. 1015 (1969), *General Committee of Adjustment* v. *Burlington Northern, Inc.,* 563 F.2d 1279 (8th Cir. 1977), *Brotherhood of Locomotive Engineers* v. *Denver & Rio Grande Western Ry. Co.,* 411 F.2d 1115 (10th Cir. 1969),

should be reviewed in regard to the important statutory question at issue here. As to *McElroy*, the Court of Appeals failed to take note that while *McElroy* spoke broadly, nevertheless it is clear from the *McElroy* Court's opinion that the peculiar and virtually unique history of cross-craft grievance representation within the two engine service craft unions was at the heart of the decision. That was how *Broady* and *Butler* in particular were able to be distinguished. To extend such multiple union representation among crafts beyond the very limited tradition reflected in *McElroy* and in the face of the statutory language and policies we have described should not be countenanced. With respect to *General Committee of Adjustment* v. *Burlington Northern, Inc., supra,* and *Brotherhood of Locomotive Engineers* v. *Denver & Rio Grande Western Ry. Co., supra,* reliance upon them was misplaced in two respects. First, both of these cases involved the two engine service craft unions, where the cross-representation tradition was well established. Second, both of these cases involved questions of union grievance handling *at arbitration.* Such a right to representation at arbitration is governed by Section 3 of the Act, not Section 2. The *Burlington Northern* and *Denver & Rio Grande Western* cases both turned on statutory claims under Section 3, particularly Section 3, Second, 45 U.S.C. § 153, Second. (See *Brotherhood of Locomotive Engineers* v. *Denver & Rio Grande Western Ry. Co., supra,* at footnote 1; see *General Committee of Adjustment* v. *Burlington Northern, Inc., supra.*) Indeed, as we noted, the statute at Section 3, First (j) clearly allows a broad right of representation at arbitration. See *Elgin, Joliet & Eastern, supra.*

IV. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI HERE BECAUSE OF A CONFLICT AMONG THE CIRCUITS AS TO THE RAILWAY LABOR ACT.

The precise issue passed upon by the Fifth Circuit below was whether Section 2 the Railway Labor Act requires that an employee is entitled to have a representative of his choice

handle his grievance at the company level of grievance proceedings. The Fifth Circuit said yes. Two other Circuits have said no.

In *Broady* v. *Illinois Central, supra,* the Seventh Circuit was faced with a claim that an employee charged in a disciplinary proceeding was entitled "to be represented at such [disciplinary] hearing by a representative of his own choosing . . .". The employee had refused to proceed without his preferred representative, was ultimately dismissed, and sued to gain his job back. While ultimately the Court of Appeals affirmed a lack of jurisdiction over the action because it was one for reinstatement, in addressing the claim of a violation of the Railway Labor Act in regard to choice of representative at the company hearing, the Court said:

> We can find no provision of the Railway Labor Act which gives to employees the right to a representative of their own choice at an investigation by company officials of a charge that the employee has violated company rules.

The Court went on to state that under the Act, the employee would only have a choice where the statutory language so prescribed, namely ". . . when the officials of the company have completed their inquiry and entered a finding . . .", that is when the matter was referred to arbitration. This right to choice at arbitration is, of course, predicated upon specific statutory language concerning the arbitration process in Section 3 of the Act. *Elgin, Joliet and Eastern Ry. Co.* v. *Burley, supra.*

The Eighth Circuit Court of Appeals in *Butler* v. *Thompson, supra,* followed *Broady* in concluding that the Railway Labor Act did not accord a right to an employee to choose a grievance representative at the company level. Both of these Circuits are in conflict with the views of the Fifth Circuit in the present case.

Petitioner believes that this Court should resolve this conflict among the Circuits on this most important point of law under the Railway Labor Act.

CONCLUSION

For the reasons set forth herein, Petitioner UTU respectfully asks that the writ be issued as requested herein.

Respectfully submitted,

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JOINT

APPENDIX

No. 86-2037

In The

Supreme Court of the United States

October Term, 1986

PAUL G. LANDERS,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

JOINT APPENDIX

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Petition for Certiorari Filed June 19, 1987
Certiorari Granted November 30, 1987

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

February 21, 1984 — Complaint filed.

— Plaintiff's Memorandum in Support of Complaint that the Court enjoin Defendant Railroad filed.

— Plaintiff's affidavit in support of motion for *ex parte* TRO filed.

February 22, 1984 — Order of Tauro, D. J., dated February 21, 1984; Because Plaintiff has failed to meet the requirements *Fed. R.Civ.Pro.* 65(b), his motion for *ex parte* TRO is DENIED without prejudice.

March 14 1984 — Defendant Brotherhood of Locomotive Engineer's Answer filed.

March 15, 1984 — Defendant National Railroad Passenger Corporation's Answer filed.

October 7, 1985 — Defendant Brotherhood of Locomotive Engineer's Motion to Dismiss, or in the alternative, for Summary Judgment filed.

— Defendant Brotherhood of Locomotive Engineer's Memorandum in Support filed.

— Affidavit of J. P. Carberry filed.

October 11, 1985 — Statement of Undisputed Facts filed.

October 21, 1985 — Supplemental affidavit of J.P. Carberry filed.

November 19, 1985— Keeton, D.J.: (By the Court) Civil Non-Jury Trial-Day 1. . . .

December 30, 1985— Defendant National Railroad Passenger Corporation's opposition to Affidavit of Paul Landers filed.

— Affidavit of E. J. Fisette filed.

— Affidavit of R. A. Herz filed.

April 2, 1986 — Keeton, D. J.: (By the Court) Hearing: parties agree that all evidence is in. . . . Oral argument held. . . .

June 27, 1986 — Keeton, D. J.: MEMO dated June 24, 1986 ENTERED.

— Keeton, D. J.: ORDER dated June 24, 1986, . . . IT IS ORDERED: . . . . Judgment for defendants with costs, ENTERED.

July 18, 1986 — Notice of appeal filed.

January 8, 1987 — Case argued before Coffin and Selya, C. J., and Gignoux, D. J.

March 24, 1987 — Court of Appeals Opinion and Judgment affirming District Court Judgment filed.

June 19, 1987 — Petition for writ of certiorari filed.

November 30, 1987— Certiorari granted.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PAUL G. LANDERS, Plaintiff, vs. NATIONAL RAILROAD PASSENGER CORPORATION and BROTHERHOOD OF LOCOMOTIVE ENGINEERS, Defendants.	)	CIVIL ACTION No. 84-467-K

COMPLAINT

PARTIES

1. The plaintiff, Paul G. Landers, is a resident of Boston, Massachusetts, and a citizen of Massachusetts and the United States.

2. The defendant, National Railroad Passenger Corporation ("Amtrak"), is a corporation organized pursuant to Title III of the Rail Passenger Service Act of 1970, as amended, 45 USC § 541, *et seq.*, for the purpose of providing various passenger railroad services in various locations within the United States. 45 USC § 501, *et seq.* Pursuant to Title III of the Rail Passenger Service Act, as amended, 45 USC § 546(b), Amtrak is subject to federal law relating to collective bargaining, employee disputes,

and employee representation matters, as set forth in the Railway Labor Act, 45 USC § 151, *et seq.* Amtrak has its national headquarters at 400 North Capitol Street, N.W., Washington, D.C., and does business in Massachusetts.

3. The defendant, Brotherhood of Locomotive Engineers ("BLE"), is a labor organization with international headquarters at Cleveland, Ohio, and represents the craft of engineers in collective bargaining on numerous rail carriers throughout the United States, including Amtrak. BLE is joined in this action pursuant to Fed. R. Civ. P. 19. BLE engages in collective bargaining with Amtrak and is party to one or more collective bargaining agreements with Amtrak setting forth terms and conditions of employment for the craft of engineers with Amtrak.

JURISDICTION

4. This action is brought for a declaration of rights and injunctive relief to enforce the provisions of, and to remedy violations of, the Railway Labor Act, 45 USC § 151, *et seq.* This Court has jurisdiction pursuant to 28 USC §§ 1331 and 2201 *et seq.*, and 45 USC § 547(a).

FACTS

5. The plaintiff has been employed as an engineer by Amtrak since January 1, 1983, and by Amtrak's predecessor railroads since 1951. Landers is, and at all times

material hereto has been, a member and officer of the United Transportation Union ("UTU").

6. The UTU is a labor organization and an unincorporated association with international headquarters at 14600 Detroit Avenue, Cleveland, Ohio. UTU engages in collective bargaining agreements with Amtrak and is party to one or more collective bargaining agreements with Amtrak setting forth terms and conditions of employment for certain crafts with Amtrak.

7. The rates of pay, rules, and working conditions for the craft of engineers employed by Amtrak are and were, beginning January 1, 1983, set by agreement between Amtrak and BLE. A copy of that agreement is attached hereto as Exhibit A.

8. On or about February 14, 1984, the plaintiff was involved in an incident, as a result of which he was removed from service by Amtrak and summoned to appear at an investigative hearing to be held on Wednesday, February 22, 1984. A copy of the notice sent to the plaintiff is attached hereto as Exhibit B.

9. The plaintiff wishes to be represented at this hearing by Harold Malone. Mr. Malone is the Local Chairman of UTU Local 262 and is a "duly accredited representative" under the agreement between Amtrak and UTU. A copy of this agreement is attached as Exhibit C.

10. The plaintiff notified Amtrak by letter, a copy of which is attached as Exhibit D, that he wished to be represented at the hearing by Mr. Malone. Amtrak has informed the plaintiff that it will not allow him to be so represented.

COUNT I

11. The plaintiff realleges and by reference incorporates herein the allegations contained in paragraphs 1 through 10 hereof, as if the same were fully set forth herein.

12. The refusal by Amtrak, as described above, to allow the plaintiff to have UTU as his representative at the investigation is in violation of the plaintiff's rights under Sections 2 and 3 of the Railway Labor Act, 45 USC §§ 152 and 153.

COUNT II

13. The plaintiff realleges and by reference incorporates herein the allegations contained in paragraphs 1 through 12 hereof, as if the same were fully set forth herein.

14. On or about October 26, 1982, Amtrak and BLE entered into an agreement establishing the terms and conditions of employment for engineers employed by Amtrak. A copy of this agreement is attached as Exhibit A.

15. Among the provisions of this agreement are Rules 20 and 21, which deal, respectively, with grievance claims for compensation and disciplinary matters. Both rules limit and restrict the representation of engineers in such matters to a "duly accredited representative," which is

defined in Rule 1 of the agreement to be only a BLE representative and has been so enforced by Amtrak.

16. Such a restriction of representation for engineers under Rules 20 and 21 to the BLE representative is unlawful under Sections 2 and 3 of the Railway Labor Act, 45 USC §§ 152 and 153, and violates the rights of Landers under Sections 2 and 3 of the Railway Labor Act where he may seek UTU representation for processing and handling grievances and disciplinary matters before a UTU-Amtrak Public Law Board. Such contract rules so restricting representation are unlawful and void.

17. The refusal of Amtrak to allow the UTU to represent Landers, as set forth above, and the adoption and implementation of the restriction on representation in Rules 20 and 21 have damaged and threaten to continue to injure the plaintiff in his right to have UTU membership and representation in violation of Sections 2 and 3 of the Railway Labor Act.

18. The acts of Amtrak, as described herein, threaten the plaintiff with irreparable harm in the loss of rights to his selected representation in regard to grievance and disciplinary matters, for which harm there is no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff prays that this Honorable Court:

1. declare the rights of the parties hereto under the Railway Labor Act;

2. enjoin Amtrak from holding any hearings or other proceedings concerning the February 14, 1984 incident, pending such declaration of rights;

3. issue a preliminary and permanent injunction ordering Amtrak to comply with the Railway Labor Act, *viz.*, to treat with or deal with UTU representatives on behalf of the plaintiff, Landers, or other engineer employees who request UTU representation in connection with grievances or disciplinary matters;

4. declare Rules 20 and 21 of the Amtrak-BLE agreement of October 26, 1982, unlawful, null, and void, as contrary to the Railway Labor Act, insofar as they restrict or limit the right of Landers and other Amtrak engineers to have their grievance claims and disciplinary matters handled at all levels and appealed by UTU and arbitrated before a UTU-Amtrak Public Law Board established pursuant to Section 3, Second, of the Railway Labor Act, 45 USC § 153, Second;

5. award the plaintiff his costs and expenses, including reasonable attorney's fees, incurred herein; and

6. grant such other relief as the Court deems just and equitable.

Respectfully submitted,

PAUL G. LANDERS
By his attorney,

/s/ James F. Freeley, Jr.
James F. Freeley, Jr.
183 State Street
Boston, Ma. 02109
523-5010

Dated: February 21, 1984

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PAUL G. LANDERS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	CIVIL ACTION
NATIONAL RAILROAD	)	No. 84-467-K
PASSENGER CORPORATION	)	
and BROTHERHOOD OF	)	
LOCOMOTIVE ENGINEERS,	)	
	)	
Defendants.	)	

ANSWER OF DEFENDANT BROTHERHOOD OF LOCOMOTIVE ENGINEERS

Defendant Brotherhood of Locomotive Engineers ("BLE") answers the complaint herein as follows:

FIRST DEFENSE

The Court lacks jurisdiction over the subject matter of the complaint.

SECOND DEFENSE

The complaint should be dismissed because it fails to set forth a claim for which relief may be granted by the Court.

THIRD DEFENSE

The complaint should be dismissed, because the Court lacks subject matter jurisdiction in that the underlying dispute is a jurisdictional one within the exclusive primary

jurisdiction of the National Mediation Board pursuant to Section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152, Ninth. Plaintiff, an officer of the United Transportation Union ("UTU"), is seeking a determination that UTU, and not BLE, is the duly designated and authorized representative for the craft of locomotive engineers employed by the defendant National Railroad Passenger Corporation ("Amtrak").

FOURTH DEFENSE

The Court lacks subject matter jurisdiction, because the claim asserted by plaintiff requires the interpretation and application of the collective bargaining agreement for the craft of locomotive engineers employed by Amtrak and represented by defendant BLE. As such, the complaint raises a minor dispute, which is within the exclusive primary jurisdiction of the National Railroad Adjustment Board in accordance with Section 3, First of the Railway Labor Act, 45 U.S.C. § 153, First.

FIFTH DEFENSE

Defendant BLE in reply to the specific allegations of the complaint says as follows:

1. Admits the allegations of paragraph 1.

2. Admits the allegations of paragraph 2.

3. Admits the allegations of paragraph 3.

4. The allegations contained in paragraph 4 are conclusions of law not requiring an answer. If required to answer, defendant BLE would deny them.

5. Admits the allegations of paragraph 5.

6. Admits the allegations set forth in paragraph 6; however, defendant BLE denies any implication that UTU is a party to any collective bargaining agreement with Amtrak providing the terms and conditions of employment for the craft of locomotive engineers represented by defendant BLE on Amtrak, or for any craft of employees of Amtrak that are promotable to or shuttle back-and-forth between the craft of locomotive engineers represented by BLE.

7. Admits the allegations of paragraph 7.

8. Denies for want of knowledge the allegations contained in paragraph 8.

9. Admits that Harold Malone is the Local Chairman of UTU Local 262; denies for want of knowledge the first sentence of paragraph 9; and denies any other allegation or implication contained therein. Further answering, defendant BLE states that the document attached as Exhibit C to the complaint is a copy of the collective bargaining agreement between Amtrak and UTU (C&T) for the crafts of conductors and trainmen and, as such, has no relevancy or materiality to this case or to plaintiff who was working in the craft of locomotive engineers at the time of the alleged incident.

10. Denies for want of knowledge the allegations contained in paragraph 10.

11. Realleges and incorporates by reference the allegations, averments and defenses set forth in response to paragraphs 1 through 10 of the complaint.

12. Denies the allegations of paragraph 12.

13. Realleges and incorporates by reference the allegations, averments and defenses set forth in response to paragraphs 1 through 12 of the complaint.

14. Admits the allegations of paragraph 14.

15. Admits the allegations of paragraph 15.

16. Denies the allegations of paragraph 16.

17. Denies the allegations of paragraph 17.

18. Denies the allegations of paragraph 18.

WHEREFORE, defendant Brotherhood of Locomotive Engineers prays that the complaint be dismissed, and that it be allowed its costs, reasonable attorneys' fees and such other and further relief as may be proper.

ROSS & KRAUSHAAR CO, L.P.A.

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(Certificate of service omitted in printing)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PAUL G. LANDERS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	CIVIL ACTION
NATIONAL RAILROAD	)	No. 84-467-K
PASSENGER CORPORATION	)	
and BROTHERHOOD OF	)	
LOCOMOTIVE ENGINEERS,	)	
	)	
Defendants.	)	

ANSWER

Defendant National Railroad Passenger Corporation ("Amtrak") answers the allegations of the numbered paragraphs of Plaintiff's Complaint as follows:

1. Defendant admits the allegations contained in paragraph 1 of the Complaint.

2. Defendant admits the allegations contained in paragraph 2 of the Complaint.

3. Defendant admits the allegations contained in paragraph 3 of the Complaint.

4. Paragraph 4 of the Complaint contains arguments and conclusions of the law which do not require an answer.

5. Defendant admits that Plaintiff has been employed as a Passenger Engineer by Amtrak since January 1, 1983, and has since that time been a member and local officer of the United Transportation Union ("UTU-

E"). Defendant lacks sufficient knowledge and information to admit or deny the remainder of the allegations contained in paragraph 5.

6. Defendant admits the allegations contained in paragraph 6 of the Complaint.

7. Defendant admits the allegations contained in paragraph 7 of the Complaint.

8. Defendant admits the allegations contained in paragraph 8 of the Complaint.

9. Defendant admits that Plaintiff expressed a desire to be represented at an investigative hearing by Harold Malone, that Mr. Malone is the Local Chairman of UTU Local 262, and is a "duly accredited representative" of Passenger Conductors and Assistant Passenger Conductors pursuant to the agreement between Amtrak and the UTU (C&T), a copy of which is attached to the Complaint as Exhibit C.

10. Defendant admits the allegations contained in paragraph 10 of the Complaint.

11. Defendant incorporates by reference herein the answers contained in paragraphs 1 through 10 hereof, as if the same were fully set forth herein, in response to paragraph 11 of the Complaint.

12. Defendant denies the allegations contained in paragraph 12 of the Complaint.

13. Defendant by reference incorporates herein the answers contained in paragraphs 1 through 12 hereof, as if the same were fully set forth herein, in response to paragraph 13 of the Complaint.

14. Defendant admits the allegations contained in paragraph 14 of the Complaint.

15. Defendant admits that Rules 20 and 21 of the agreement between Amtrak and BLE, attached to the Complaint as Exhibit A, deal respectively with claims for compensation and disciplinary matters, and that Rule 1 of that agreement defines "duly accredited representative" as the General Chairman of the Brotherhood of Locomotive Engineers having jurisdiction or any elected officer of the Brotherhood of Locomotive Engineers designated by the General Chairman. Defendant denies the remaining allegations of paragraph 15 of the Complaint.

16. Defendant denies the allegations contained in paragraph 16 of the Complaint.

17. Defendant denies the allegations contained in paragraph 17 of the Complaint.

18. Defendant denies the allegations contained in paragraph 18 of the Complaint.

Respectfully submitted,

/s/ Harold R. Henderson
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National Railroad Passenger
Corporation

DATED: March 12, 1984

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PAUL G. LANDERS, Plaintiff,	)	
vs.	)	CIVIL ACTION
NATIONAL RAILROAD PASSENGER CORPORATION and BROTHERHOOD OF LOCOMOTIVE ENGINEERS, Defendants.	)	No. 84-467-K

AFFIDAVIT OF J. P. CARBERRY

STATE OF NEW YORK)
) ss:
COUNTY OF MONROE)

J. P. Carberry, being first duly sworn, deposes and says:

1) I am an International Vice President of the Brotherhood of Locomotive Engineers and at all times material hereto have been assigned to assist the General Chairman of the General Committee of Adjustment, Brotherhood of Locomotive Engineers, on the National Railroad Passenger Corporation ("Amtrak"). This affidavit is made in support of the motion to dismiss or, in the alternative, for summary judgment submitted by the Brotherhood of Locomotive Engineers ("BLE"), a co-defendant herein.

2) The BLE is an unincorporated association and a labor union, national in scope, organized in accordance with the Railway Labor Act, and admits to membership persons

employed in the craft of locomotive engineers and in the craft of firemen. BLE has two members on the First Division of the National Railroad Adjustment Board, which Board was created pursuant to Section 3 of the Railway Labor Act (45 U.S.C. § 153). BLE is the bargaining representative for locomotive engineers on most of the nation's railroads and for the craft of locomotive firemen on a few railroads.

3) Since October 26, 1982, BLE and Amtrak have been parties to a written collective bargaining agreement for the craft or class of persons employed by Amtrak as passenger engineers in the Northeast Corridor, *i.e.*, employees engaged in the operation of engines and any other motive power used in performing the work or the services provided by or generally recognized as the work of passenger engineers over the lines or operating districts of Amtrak between Boston, Massachusetts and New York, New York, including Springfield, Massachusetts, and between New York and Washington, D.C., including Harrisburg, Pennsylvania. This agreement contains provisions for the rates of pay, hours of work, health and welfare benefits, seniority rights, and numerous other terms and conditions of employment for the employees of that craft or class.

4) In Rule 1b of the BLE-Amtrak collective bargaining agreement, effective January 1, 1983, Amtrak "recognizes the General Committee of Adjustment of the Brotherhood of Locomotive Engineers, the Chairman of which is signatory hereto as bargaining representative of all Passenger Engineers employed by the Corporation in the Northeast Corridor." It is the duty of the General Chair

man under the Railway Labor Act to represent those employees of Amtrak in the craft or class of passenger engineers for which BLE is exclusive representative in the negotiations, maintenance, interpretation and enforcement of the working agreements covering the rates of pay, rules and working conditions thereof.

5) United Transportation Union ("UTU") is an unincorporated association and a labor union national in scope, organized in accordance with the Railway Labor Act, and admits to membership employees in the crafts and classes of locomotive engineers, firemen, conductors, trainmen and yardmen. As in the case of BLE, UTU has two members on the First Division, National Railroad Adjustment Board. UTU is bargaining representative for the craft of locomotive firemen on many of the nation's railroads and for the craft of locomotive engineers on a few railroads. As a result of admitting to membership persons employed as engineers or firemen, UTU is in direct competition with BLE to obtain representation rights for those crafts or classes under the Railway Labor Act.

6) UTU is the recognized bargaining representative only for the crafts or classes of engine attendants, passenger conductors and assistant passenger conductors employed by Amtrak on its lines in the Northeast Corridor. As the exclusive bargaining representative of the aforementioned crafts or classes, UTU, through its various General Committees of Adjustment, has entered into collective bargaining agreements governing the rates of pay, hours of service and working conditions of all Amtrak employees in the Northeast Corridor engaged in performing the work of engine attendants, passenger conductors and assistant passenger conductors.

7) Amtrak is a corporation organized pursuant to Title III of the Rail Passenger Service Act of 1970, as amended, 45 U.S.C. § 541, *et seq.*, and has provided various passenger railroad services in various locations within the United States since 1971. Pursuant to said Act, 45 U.S.C. § 546(b), Amtrak is subject to the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, and its provisions relating to collective bargaining, employee disputes, and union-employee representation matters. Amtrak's headquarters and principal offices are located at 400 North Capitol Street, N.W., Washington, D.C. 20001.

8) Although Amtrak has had its own managerial personnel and employees in certain crafts or classes of employment, such as clerical employees, from its beginning those individuals working in the craft or classes of locomotive engineers, conductors and other operating services, however, have been supplied by other railroads under operating agency or service arrangements. When Consolidated Rail Corporation ("Conrail") took over the bankrupt railroad operations in the Northeast on April 1, 1976, its engine and train crew operated the Amtrak passenger trains over its lines of railroad, including the intercity passenger trains over the Northeast Corridor involved in this case.

9) On August 13, 1981, the Northeast Rail Service Act of 1981 ("NERSA"), 45 U.S.C. § 1101 *et seq.*, was adopted. Section 1165(a) of NERSA, 45 U.S.C. § 1113(a), terminated Conrail's responsibility of providing crews for Amtrak's intercity passenger service on the Northeast Corridor on January 1, 1983, and provided for negotiation of agreements permitting Conrail's employees in the operating

crafts or classes of employment (*i.e.*, engineers, firemen, conductors and trainmen), who held seniority in both freight service (Conrail's function) and passenger service (Amtrak's operations) to move from one service to the other each six-month period commencing with January 1, 1983.

10) At diverse times following passage of NERSA, discussions took place between representatives of BLE, Amtrak and Conrail relative to implementation of Section 1165 of NERSA and between BLE and Amtrak for establishment of agreements applicable to the locomotive engineers becoming employees of Amtrak. As a result of extensive negotiations, BLE, Amtrak and Conrail entered into a Section 1165 agreement on October 20, 1982, which, is attached hereto as Exhibit 1. This agreement provides the terms and conditions by which locomotive engineers of Conrail become passenger engineers of Amtrak and for their seniority and flowback rights. Article V. B of the BLE § 1165 agreement provides:

> "Employees returning to Conrail pursuant to Articles V.A. 1 and 2 above shall exercise their Conrail seniority in accordance with the applicable Conrail Displacement Rule."

Under this provision, an Amtrak passenger engineer, who cannot continue to hold a position as a passenger engineer in the normal exercise of his seniority rights as a passenger engineer with Amtrak, or desires to return to Conrail on April 1 or October 1 of each year, must displace into the craft or class of locomotive engineers in freight and yard service on Conrail. In short, the passenger engineer must return to the craft or class of locomotive engineers employed by Conrail.

11) On October 26, 1982, BLE and Amtrak entered into the aforementioned collective bargaining agreement governing the rates of pay, rules and working conditions for the craft or class of passenger engineers, including seniority provisions, discipline and investigation rules, and machinery for resolution of disputes involving the interpretation and application of the collective bargaining agreements related to those passenger engineers. A copy of the working agreement is attached hereto as Exhibit 2.

12) As previously indicated, Rule 1b. of the BLE-Amtrak agreement recognizes the BLE General Committee, as the bargaining representative of all passenger engineers employed by Amtrak in the Northeast Corridor. "Duly accredited representative" is defined in Rule 1c. as "the General Chairman of the Brotherhood of Locomotive Engineers having jurisdiction or any elected officer of the Brotherhood of Locomotive Engineers designated by the General Chairman." Rules 3 and 7 limit passenger engineers to seniority in that service to the Northeast Corridor, which is divided into two working zones. Also in conformity with the § 1165 Agreement, if unable to displace any passenger engineers due to not possessing sufficient seniority, the Amtrak passenger engineer is placed in furlough status with the right to exercise flowback rights into the craft of locomotive engineers only on Conrail.

13) Rule 20 of the BLE-Amtrak collective bargaining agreement provides for the handling of claims. The rule in its entirety is set out at pages 14-17 of the agreement attached as Exhibit 2. In pertinent part, the rule provides that a claim for compensation "may be made only by a claimant or, on his behalf, by a duly accredited repre-

sentative," as defined in Rule 1c. Until such time that the claim reaches the last stage of appeal before the highest officer of the company designated to handle claims, appeals must be handled by the claimant or the "duly accredited representative." At the last step of claim handling, Rule 20g. specifies that "the General Chairman appeals it in writing to the highest officer of Amtrak." In the event the claim is denied at that level, the BLE General Chairman may invoke arbitration. The passenger engineer claimant, however, may submit any denied claim fo. arbitration before the First Division of the National Railroad Adjustment Board. In accordance with Section 3, First (j) of the Railway Labor Act, 45 U.S.C. § 153, First (j), parties, including any individual claimant, "may be heard in person, by counsel, or by other representatives, as they may respectively elect," before the Adjustment Board.

Rule 21, which is set forth at pages 17-22 of Exhibit 2 to my affidavit, provides procedures for the holding of investigations and entry of discipline for passenger engineers. Rule 2 e. (page 20) states:

> "A Passenger Engineer who may be subject to discipline and his duly accredited representative will have the right to be present during the entire investigation."

As in the case of Rule 20, the duly accredited representative may process appeals; the General Chairman must process any appeal at the final stage of handling appeals on the property and may subsequently invoke expedited arbitration; and as previously stated the passenger engineer may submit a denial for arbitration to the First Di-

vision of the National Railroad Adjustment Board, where he may be heard in person, by counsel or other representative of his choosing.

14) On November 8, 1982, Amtrak and UTU (C) and (T) entered into a collective bargaining agreement governing the crafts or classes of passenger conductors and assistant passenger conductors employed by Amtrak. (Exhibit 3). That agreement contains provisions similar to those contained in BLE's agreement regarding the definition of "duly accredited representative," and the attendance and representation by the "duly accredited representative" at investigations and in the appeals process for handling claims and discipline.

15) On December 3, 1983, UTU (E) entered into a Section 1165 agreement with Conrail and Amtrak. (Exhibit 4). On the same date, UTU entered into a collective bargaining agreement with Amtrak for the craft or class of engine attendants. (Exhibit 5).

16) The section 1165 agreement entered into by UTU (E) provides in Article I. A. that "all Conrail employees holding seniority rights within the craft or class of hostlers as of December 31, 1982 shall have the opportunity to exercise those rights to passenger service on Amtrak as Engine Attendants effective January 1, 1983, and on each and every April 1st and October 1st thereafter, in accordance with the provisions of this Agreement." "Hostlers" are those employees who move locomotives (that is power units and not trains) within certain confined areas, such as engine houses, shops, storage or station tracks. In addition to moving the locomotives around

engine houses or storage tracks, hostlers are required to refill and resupply the locomotives with fuel, water and sand. These are the duties that engine attendants are confined to on Amtrak with passenger train locomotives. (See Rule 2 at page 2 of Exhibit 5). The movement of trains with locomotives and the locomotives themselves within and on main lines, or branch lines, or within yard facilities, or in road, local or yard service is the work of locomotive engineers. If an Amtrak engine attendant cannot hold a position as such on Amtrak, he or she must displace to Conrail by exercising his or her seniority rights in the craft of firemen, hostlers, and hostler helpers. (Artice V, pages 5-6 of Exhibit 4).

17) UTU (E)'s collective bargaining agreement of December 3, 1982, for engine attendants defines "duly accredited representative" as "a member of the Local Committee of Adjustment of the United Transportation Union (E) having jurisdiction or a member of the United Transportation Union designated by the General Chairman." (Rule 1d.) Rules 17 and 19 (pages 21-37, Exhibit 5) are virtually identical to those in the UTU (C) and (T) and BLE agreements. Once again only the claimant or "duly accredited representatives" as defined in the agreement may process claims, provide representation and question witnesses at a formal investigation, and process appeals of claims, grievances or discipline matters. Under the UTU agreements, BLE, not being a duly accredited representative of the craft or class of passenger conductors, assistant passenger conductors, or engine attendants, may not represent any individual working in those crafts or classes.

18) On March 6, 1985, the National Mediation Board, pursuant to Section 2, Ninth of the Railway Labor Act, certified BLE as bargaining representative for the craft of locomotive engineers on Amtrak. NMB Case No. R-5533 (12 NMB No. 4). The vote was 205 engineers for BLE and 4 for UTU.

19) At all times since Amtrak assumed intercity passenger service in the Northeast Corridor with its own operating crews, passenger engineers have been exclusively represented by BLE as the duly accredited representative of the craft or class of passenger engineers on Amtrak in negotiations, at investigative hearings, and in disputes resolution.

20) Plaintiff Paul G. Landers is and has been an officer of UTU and at the time of the hearing was Local Chairman of Local #14 of the UTU. Among the duties of a local chairman are the representation of employees at investigations and in the processing of their claims and grievances. Plaintiff has had much experience in representing employees at hearings and in processing claims.

21) On February 17, 1984, plaintiff Landers was issued a notice of investigative hearing in which he was charged with failure to comply with certain operating and safety rules while performing his assignment as engineer on Train EBBO-1, Boston, Massachusetts on February 14, 1984. (Exhibit 6).

22) The investigative hearing into these charges was conducted on February 28, 1984. Prior to the hearing, Landers requested to be represented by a local chairman of the UTU. (See Exhibit 7). However, Amtrak advised

plaintiff Landers that under the terms of the collective bargaining agreement he could only be represented by the duly accredited representative of his craft, which would be the general chairman of BLE or any elected officer of BLE designated by said general chairman. Plaintiff appeared and represented himself at the hearing.

23) On March 6, 1984, Amtrak concluded that the charges against Landers had been proven and assessed him a 30-day suspension. After serving the suspension, plaintiff returned to work as a passenger engineer, a position he presently holds.

24) Plaintiff Landers did not appeal his suspension to the National Railroad Adjustment Board, and at no time did he request any assistance from BLE.

25) Neither Mr. Landers, nor any other Amtrak passenger engineer performs temporary services in or is temporarily transferred to any craft or class of service on Amtrak as to which BLE is not the duly designated and authorized representative for purposes of the Railway Labor Act. In fact, no passenger engineer on Amtrak holds employment rights on that carrier in any craft or class other than passenger engineers, which classification is exclusively represented by BLE.

26) The BLE, as the exclusive bargaining representative for all employees in the craft or class of passenger engineers on Amtrak, is under an enforceable obligation to fairly represent all employees covered by the agreement for that craft or class.

27) Both the collective bargaining agreement entered into between BLE and Amtrak and legal precedent

recognize that Amtrak must negotiate with BLE, and with no other Union, on the terms and conditions of the contract governing Amtrak's passenger engineers in the Northeast Corridor. However, collective bargaining does not end with the execution of that agreement. The contract is given meaning, breadth and vitality through the adjustments required to meet the daily demands placed upon the agreement and by the resolution of grievances and claims. If UTU or any other union is permitted to handle claims or grievances without participation of BLE, BLE would be shut out of the continuing process of collective bargaining. This expulsion could change or even nullify specific contractual provisions negotiated by BLE without the latter's approval as the collective bargaining representative. In addition, UTU or a minority union could use grievance handling to destroy BLE's prestige with employees in the craft and class of passenger engineers and thereby upset its majority standing. In short, grievance handling by UTU could be used as a foundation to change representation rights for the craft or class of passenger engineers.

/s/ J. P. Carberry

(Jurat omitted in printing)

EXHIBIT 2

THIS AGREEMENT made this 26th day of October, 1982, by and between the National Railroad Passenger Corporation and Passenger Engineers represented by the Brotherhood of Locomotive Engineers.

WHEREAS, in the Rail Passenger Service Act of 1970, as amended by the Amtrak Improvement Act of 1981, Congress has established for the National Railroad Passenger Corporation (Amtrak) the goal of maximumization of its resources, including the most cost effective use of employees; and

WHEREAS, effective January 1, 1983, Amtrak will assume its own train and engine operations heretofore performed by the Consolidated Rail Corporation (Conrail) pursuant to the Northeast Rail Service Act of 1981; and

WHEREAS, Amtrak desires to employ persons currently employed by Conrail in its engine service operations, and those employees desire to accept employment with Amtrak; and

WHEREAS, the Brotherhood of Locomotive Engineers now represents all employees of Conrail in the craft of Locomotive Engineers who would accept Passenger Engineer positions with Amtrak; and

WHEREAS, Congress, in the Amtrak Improvement Act of 1981, also imposed upon both Amtrak and the Brotherhood of Locomotive Engineers the duty to enter into a cooperative effort to achieve the efficiencies and economies necessary to operate a modern passenger service entity;

NOW, THEREFORE, it is hereby agreed in conformity therewith that the following Rules shall govern the rates of pay, rules and working conditions of employees of Amtrak employed in its engine service operations:

RULE 1—SCOPE AND DEFINITIONS

a. This Agreement will apply to the work or service of transporting passengers performed by the employees specified herein and governs the rates of pay, hours of service and working conditions of all such employees engaged in the operation of engines and any other motive power used in performing the work or services provided by Passenger Engineers and all other work generally recognized as the work of Passenger Engineers performed on main lines or branch lines, or within yard facilities, or in road, local or yard services.

It is understood that the duties and responsiblities of Passenger Engineers will not be assigned to others. If a new type of locomotive or motive power is placed in service, Passenger Engineers will be instructed in the operation of the new type of locomotive power and used to operate it.

b. The National Railroad Passenger Corporation (hereinafter the "Corporation") recognizes the General Committee of Adjustment of the Brotherhood of Locomotive Engineers, the Chairman of which is signatory hereto as bargaining representative of all Passenger Engineers employed by the Corporation in the Northeast Corridor.

c. "Duly accredited representative" means the General Chairman of the Brotherhood of Locomotive Engineers having jurisdiction or any elected officer of the Brotherhood of Locomotive Engineers designated by the General Chairman.

d. "Crew Base" means the territory encompassed within a radius of 30 miles measured from the principal

Amtrak station or facility designated by the Corporation for each crew base.

* * *

RULE 20—TIME LIMIT ON CLAIMS

a. A claim for compensation alleged to be due may be made only by a claimant or, on his behalf, by a duly accredited representative. No later than 60 days from the date of the occurrence on which the claim is based, a claimant or his duly accredited representative must submit two timeslips alleging the claim to the officer of the Corporation designated to receive timeslips. The representative of the Corporation who receives the timeslips from the claimant or from his duly accredited representative must acknowledge receipt of the timeslips by signing and dating them, and return the duplicate copy to the claimant or his duly accredited representative. If not presented in the manner outlined in this paragraph, a claim will not be entertained or allowed, but improper handling of one claim will not invalidate other claims of a like or similar nature. No monetary claim will be valid, unless the claimant was available, qualified, and entitled to perform the work.

b. If a claimant is absent because of sickness, temporary disability, leave of absence, vacation or suspension, the 60-day time limit will be extended by the number of days the claimant is absent.

c. To file a claim, a claimant or his duly accredited representative will be required to furnish sufficient information on the time slip to identify the basis of the claim, such as:

1. Name, occupation, employee number, division.
2. Train symbol or job number and engine number(s).
3. On and off duty time.
4. Date and time of day work performed.
5. Location and details of work performed for which claim is filed.
6. Upon whose orders work was performed.
7. Description of instructions issued to have such work performed.
8. Claim being made, rule if known, and reason supporting claim.

d. When a claim for compensation alleged to be due is not allowed, or should payment be made for less than the full amount claimed, the claimant will be informed of the decision and reasons for it, in writing within 60 days from the date that claim is received. When the claimant is not so notified, the claim will be allowed, but such payment will not validate any other such claims, nor will such payment establish any precedent.

e. A claim for compensation denied in accordance with the foregoing paragraph "d" will be invalid unless, within 60 days after the date of the initial denial of the claim, the claimant's duly accredited representative appeals it in writing in the following form to the Labor Relations officer designated to handle claims:

1. *Subject:* (Set forth nature of claim, dates, name of claimant)
2. *Employees' Statement of Facts:*

3. *Position of Employees:*

NOTE: Claims of a continuing nature will be considered properly appealed when listed and identified with the initial claim by the duly accredited representative with the designated Labor Relations officer.

f. The Labor Relations officer will arrange to meet on a regular basis with duly accredited representatives who request to discuss appeals which have been received by the Labor Relations officer at least 10 days in advance of a meeting. In the written appeal, the duly accredited representative should either request to discuss the appeal at the regular meeting with the Labor Relations officer or waive the discussion and request a written response. The Labor Relations officer will render a decision in writing to the duly accredited representative within 60 calendar days of the date the Labor Relations officer receives the appeal requesting the written decision or within 60 days of the date the appeal was discussed at a meeting. If the claim is denied, the decision will be rendered in the following form:

1. *Corporation's Statement of Facts:*
2. *Position of Corporation:*

When a claim is denied and the duly accredited representative is not notified within the time limit, the claim will be allowed but such payment will not validate any other such claim nor will such payment establish any precedent. Appeals received less than 10 days in advance of a meeting will be scheduled for discussion at the next meeting.

g. A claim for compensation denied in accordance with the foregoing paragraph "f" will be invalid unless, within 90 days of the date of the denial by the Labor Relations officer, the General Chairman appeals it in writing to the highest officer of the Corporation designated to handle claims. The highest officer of the Corporation designated to handle claims will meet on a regular monthly basis with the General Chairman who has made a request to discuss appeals received at least 10 days in advance of a meeting. In the written appeal, the General Chairman should either request to discuss the appeal at the regular monthly meeting or waive the discussion and request a written response. Neither party will be limited by the positions taken during prior handling. The highest officer of the Corporation designated to handle claims will render a decision in writing within 90 days of the date he receives the appeal or within 90 days after discussing the claim at a meeting. When the General Chairman is not so notified, claim will be allowed but such payment will not validate any other such claim or establish any precedent. Appeals received less than 10 days in advance of a meeting will be scheduled for the next meeting.

h. The decision of the highest officer of the Corporation designated to handle claims will be final and binding unless, within six months after the date of that decision, the officer is notified in writing that his decision is not accepted. In the event of such notification, the claim will become invalid unless, within one year from the date of the Corporation's decision, the claims are disposed of on the property or submitted to a tribunal having jurisdiction pursuant to law or agreement, unless the parties

mutually agree to other proceedings for final disposition of said claims.

i. The time limit provisions in this Rule may be extended at any level of handling in any particular case by mutual consent of the duly authorized officer of the Corporation or representative of the Organization.

j. The time limits set forth herein do not apply in discipline cases.

RULE 21—DISCIPLINE AND INVESTIGATION

a. Except as provided in paragraph "e," no Passenger Engineer will be disciplined, suspended or dismissed from the service until a fair and impartial formal investigation has been conducted by an authorized Corporation officer.

b. 1. Except when a serious act or occurrence is involved, a Passenger Engineer will not be held out of service in disciplinary matters before a formal investigation is conducted. A serious act or occurrence is defined as: *Rule "G," Insubordination, Extreme Negligence, Stealing.*

2. If a Passenger Engineer is held out of service before a formal investigation for other than a serious act or occurrence, he will be paid what he would have earned on his assignment had he not been held out of service beginning with the day he is taken out of service and ending with the date the decision is rendered or he is returned to service, excluding the day of the formal investigation, whether or not he is disciplined. Holding a Passenger Engineer out of service before a formal investigation or paying him for being out of service for less than a serious act or occurrence is not prejudging him.

c. Formal investigations, except those involving a serious act or occurrence, may be dispensed with should the Passenger Engineer involved and or the duly accredited representative and an authorized officer of the Corporation, through informal handling, be able to resolve the matter to their mutual interests. Requests for informal handling must be made at least 24 hours before a formal investigation is scheduled to begin. No formal transcript, statement or recording will be taken at the informal handling. When a case is handled informally and the matter of responsibility and discipline to be assessed, if any, is resolved, no formal investigation will be required. A written notice of the discipline assessed and the reason therefor will be issued to the Passenger Engineer responsible, with a copy to the duly accredited representative if he participated in the informal handling, at the conclusion of the informal handling. Discipline matters resolved in accordance with this paragraph are final and binding.

d. 1. A Passenger Engineer directed to attend a formal investigation to determine his responsibility, if any, in connection with an act or occurrence will be notified in writing within seven days from the date of the act or occurrence or in cases involving stealing or criminal offense within seven days from the date the Corporation becomes aware of such act or occurrence. The notice will contain:

A. The time, date and location where the formal investigation will be held.

B. The date, approximate time and the location of the act or occurrence.

C. A description of the act or occurrence which is the subject of the investigation and rules which may be involved.

D. A statement that he may be represented by his duly accredited representative.

E. The identity of witnesses directed by the Corporation to attend.

2. When a letter of complaint against a Passenger Engineer is the basis for requiring him to attend the formal investigation, the Passenger Engineer will be furnished a copy of the written complaint together with the written notice for him to attend the investigation.

e. 1. The investigation must be scheduled to begin within seven days from the date the Passenger Engineer received notice of the investigation.

2. A Passenger Engineer who may be subject to discipline will have the right to have present desired witnesses who have knowledge of the act or occurrence, to present testimony, and the Corporation will order employee witnesses to be in attendance.

3. The time limit is subject to the availability of the principal(s) involved and witness(es) to attend the formal investigation and may, by written notice to the Passenger Engineer involved, be extended by the equivalent amount of time the principal(s) involved or necessary witness(es) are off duty due to sickness, temporary disability, discipline, leave of absence or vacation.

When a Passenger Engineer is being held out of service for a serious act or occurrence pending the investigation and other principal(s) or witness(es) are not avail-

able for the reasons cited, he may request commencement of the investigation. If either the Passenger Engineer or the Corporation officer is of the opinion that the testimony of the unavailable principal(s) or witness(es) is necessary for the final determination of the facts and discipline has been assessed against the Passenger Engineer as a result of the investigation, such discipline will be reviewed when the testimony of the missing principal(s) or witness(es) is available.

4. When a formal investigation is not scheduled to begin within the time limit as set forth in this Rule, no discipline will be assessed against the Passenger Engineer.

5. A Passenger Engineer who may be subject to discipline and his duly accredited representative will have the right to be present during the entire investigation. Witnesses may be examined separately but those whose testimony conflicts will be brought together.

f. When A Passenger Engineer is assessed discipline, a true copy of the investigation record will be given to the Passenger Engineer and to his duly accredited representative with the notice of discipline.

g. 1. If discipline is to be imposed following a formal investigation, the Passenger Engineer to be disciplined will be given a written notice of the decision within 10 days of the date the formal investigation is completed, and at least 15 days prior to the date on which the discipline is to become effective, except that in cases involving serious acts or occurrences, discipline may be effective at any time.

2. When a Passenger Engineer is required to perform service during a period of suspension, the balance of said suspension will be eliminated.

h. 1. When a Passenger Engineer or his duly accredited representative considers the discipline imposed unjust and has appealed the case in writing to the Labor Relations officer having jurisdiction within 15 days of the date the Passenger Engineer is notified of the discipline, the Passenger Engineer will be given an appeal hearing. Dismissal cases involving claims for time lost will be handled in accordance with the provisions of paragraph "k."

2. The hearing on an appeal, if requested, will be granted within 15 days of the Labor Relations officer's receipt of the request for an appeal hearing.

3. Except when discipline assessed is dismissal, or when a Passenger Engineer has been held out of service under paragraph "b" and assessed discipline, this appeal will act as a stay in imposing the discipline until after the Passenger Engineer has been given an appeal hearing.

4. At appeal hearings, a Passenger Engineer may, if he desires to be represented at such hearings, be accompanied by his duly accredited representative.

5. The Labor Relations officer having jurisdiction will advise the Passenger Engineer of the decision, in writing at the conclusion of the appeal hearing, with a copy to the duly accredited representative. If the decision is to the effect that the discipline will be imposed, either in whole or for a reduced period, the stay referred to in paragraph "h3" will be lifted, and the discipline will be effective on the day following the day of the appeal hearing.

i. If a decision rendered by the Labor Relations officer is to be appealed, the General Chairman must, with-

in 60 days after the date the decision is rendered by the Labor Relations officer, make an appeal in writing to the highest appeals officer of the Corporation requesting either that he be given a written response or that the case be held in abeyance pending discussion in conference with the highest appeals officer of the Corporation. When a written response is requested, the highest appeals officer of the Corporation will give written notification of his decision to the General Chairman within 60 days after the date of his receipt of the appeal. When a request is made for the case to be held in abeyance pending discussion in conference, the conference will be arranged within 60 days after the highest officer of the Corporation receives the request for a conference. The highest appeals officer of the Corporation will give written notification of his decision to the General Chairman within 60 days after the date of the conference.

j. The decision of the highest appeals officer of the Corporation will be final and binding unless, within 60 days after the date of the written decision, that officer is notified in writing that his decision is not accepted. In the event of such notification, the decision on a case involving other than dismissal is still final and binding, unless the case is submitted to a tribunal having jurisdiction pursuant to law within one year computed from the date the decision was rendered.

Expedited Procedure for Handling Dismissal Cases.

k. 1. When a Passenger Engineer is dismissed, his case may be given expedited handling by his General Chairman to a Special Board of Adjustment, which will

meet in Philadelphia, PA, and be composed of three members:

1. A representative of the Brotherhood of Locomotive Engineers.

B. The highest appeals officer of the Corporation or his designated representative.

C. A neutral member selected by the parties.

In the event the parties are unable to agree upon a neutral member, they will request the National Mediation Board to appoint a neutral. Such Special Board will be established pursuant to Public Law 89-456 89th Congress, H. R. 706 June 20, 1966, within 30 days of the effective date of this Agreement.

2. Before invoking the services of the Special Board of Adjustment, the General Chairman must, within 30 days after the date of a notice of dismissal, appeal the case in writing directly to the highest appeals officer of the Corporation.

3. In the written appeal, the General Chairman should either request a conference or waive the conference and request a written decision. When a conference is requested, a meeting date will be arranged as promptly as possible but not later than 30 days after the highest appeals officer of the Corporation receives the request. The highest appeals officer will render a decision in writing to the General Chairman as promptly as possible, but not later than 15 days after the date the case is discussed in conference. When a written decision is requested, the highest appeals officer of the Corporation will render a decision in writing to the General Chairman as promptly

as possible, but not later than 30 days after date the appeal is received.

4. The decision of the highest appeals officer of the Corporation will be final and binding unless within 30 days after the date the General Chairman receives the decision, the General Chairman notifies the highest appeals officer of the Corporation in writing of his desire to submit the case to the Special Board of Adjustment. After the highest appeals officer of the Corporation receives such notification, the Board will be convened as promptly as possible. The Board will render a final and binding decision as promptly as possible, but not later than 30 days after the case is presented before the Board.

5. Claim for time lost will be waived in any dismissal case which the Organization does not progress under the Expedited Procedure for Handling Dismissal Cases. This will not preclude the Organization from progressing such a case to a tribunal having jurisdiction pursuant to law without regard to any time limits in this Rule. The progression of such a case will not be considered a request for leniency.

l. 1. Time limits provided for in this Rule may be extended or waived by agreement in writing between the applicable officer of the Corporation and the Passenger Engineer's General Chairman or duly accredited representative.

2. If discipline assessed is not appealed within the time limits set forth in this Rule or as extended, the decision will be considered final, except as provided in paragraph "k5." If the decision on the appeal is not rendered

within the time limits set forth in this Rule or as extended, the discipline assessed will be expunged.

m. When notification in writing is required, personal delivery or proof of mailing within the specific time limit will be considered proper notification.

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RULE 29—UNION SHOP

a. Subject to the terms and conditions below, all Passenger Engineers will, as a condition of their continued employment, hold or acquire union membership in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act, and admitting Passenger Engineers to membership. Nothing herein will prevent any Passenger Engineer from changing union membership from one organization to another organization admitting Passenger Engineers to membership.

b. Passenger Engineer will join any one of the labor organizations, described in paragraph "a" of this Rule, within 60 calendar days of the date on which they complete 30 days of compensated service as Passenger Engineers within 12 consecutive calendar months, and will retain such membership during the time they are employed as Passenger Engineers, except as otherwise provided herein.

c. When Passenger Engineers are regularly assigned to official or subordinate official positions or are transferred to regular assignments in another craft, they will not be compelled to maintain membership as provided herein, but may do so at their own option.

d. Nothing herein will require a Passenger Engineer to become or remain a member of the Brotherhood of Lo-

comotive Engineers if membership is not available to him upon the same terms and conditions as apply to any other member, or if his membership is denied or terminated for any reason other than his failure to tender the periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership. The dues, initiation fees and assessments referred to herein mean indebtedness accruing for these items.

e. The Brotherhood of Locomotive Engineers will keep account of Passenger Engineers and will independently ascertain whether they comply with union membership requirements.

f. The General Chairman of the Brotherhood of Locomotive Engineers will notify the appropriate Labor Relations officer in writing of any Passenger Engineer whose employment he requests be terminated because of the Passenger Engineer's failure to comply with union membership requirements. Upon receipt of such notice and request, the Corporation will, as promptly as possible but within 10 calendar days of such receipt, notify the Passenger Engineer concerned in writing by registered or certified mail, return receipt requested, sent to his last known address, or sent by receipted personal delivery, that he is charged with failure to comply with the union membership requirements. A copy of the notice will be given to the General Chairman. Any Passenger Engineer so notified who disputes the charge that he has failed to comply with union membership requirements will, within 10 calendar days from the date of such notice, request the Corporation in writing to accord him a formal hearing. Such a request

will be honored by the Corporation and a date set for the formal hearing as soon as possible, but within 10 calendar days of the date of the receipt of the request. A copy of the notice of such formal hearing will be given to the General Chairman. The receipt by the Corporation of a request for a hearing will stay action on the request by the General Chairman for termination of the Passenger Engineer's employment until the formal hearing is held and the final decision is rendered. If the Passenger Engineer concerned fails to request a formal hearing as provided for herein, the Corporation will proceed to terminate his employment on the end of 30 calendar days from receipt of the request from the General Chairman, unless the Corporation and the Brotherhood of Locomotive Engineers agree otherwise in writing.

g. The Corporation will determine on the basis of evidence produced at the formal hearing whether or not the Passenger Engineer has complied with the union membership requirements, and will render a decision accordingly. Such a decision will be rendered within 10 calendar days of the hearing date, and the Passenger Engineer and the General Chairman will be promptly notified. A transcript of the hearing will be furnished to the General Chairman. If the decision is that the Passenger Engineer has not complied with union membership requirements, his employment as a Passenger Engineer will be terminated within 10 calendar days of the date of the decision, unless the Corporation and the Brotherhood of Locomotive Engineers agree otherwise in writing. If the decision of the Corporation is not satisfactory to the Passenger Engineer or to the Brotherhood of Locomotive Engineers, it may be appealed in writing directly to the highest offi-

cer of the Corporation designated to handle appeals. Such appeal must be received within 10 calendar days of the date of decision appealed from, and the decision on such an appeal will be rendered within 20 calendar days of the date the appeal is received. The decision by the highest appeals officer of the Corporation designated to handle appeals will be final and binding unless, within 30 calendar days thereafter, the Corporation is notified in writing that the decision is unsatisfactory, and in such event, the dispute may be submitted to a tribunal having jurisdiction within six months of the date of such decision. A representative of the Brotherhood of Locomotive Engineers will have the right to be present at and participate in any hearing which involves the Brotherhood of Locomotive Engineers.

h. The discipline rule will not apply to union membership requirement cases.

i. Nothing herein will be used as a basis for time or money claims against the Corporation.

• • •

Signed at Washington, D.C., this 26th day of October, 1982.

For The National Railroad Passenger Corporation	For The Brotherhood of Locomotive Engineers
/s/ G. F. Daniels, Vice President Labor Relations	/s/ W. J. Wanke First Vice President
/s/ G. R. Weaver, Jr., Assistant Vice President, Labor Relations	/s/ J. P. Carberry Vice President
	/s/ T. J. Cavan General Chairman

/s/ J. K. Shoemaker, Assistant Vice President, Transportation	/s/ Harold A. Ross General Counsel
/s/ Harold K. Henderson, Deputy General Counsel	
/s/ L. D. Miller, Manager, Labor Relations	

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EXHIBIT 3

RULE 1

SCOPE AND DEFINITIONS

a. This Agreement will apply to the work of service of transporting passengers performed by the employees specified herein and governs the rates of pay, hours of service and working conditions of all employees, as defined in this Rule, engaged in the performance of work presently recognized as the exclusive work of passenger train service employees on main lines, or branch lines or within yard facilities.

b. The National Railroad Passenger Corporation (hereinafter the "Corporation") recognizes the General Committees of Adjustment of the United Transportation Union (C) and (T), the Chairmen of which are signatories hereto as bargaining representatives of all train service employees in their respective jurisdictions in the Northeast Corridor.

c. The words "employee" or "employees" as used in this Agreement refer to all train service operating craft personnel. Train service operating craft personnel will be classified as Passenger Conductor or Assistant Passenger Conductor.

d. "Duly accredited representative" means a member of the Local Committee of Adjustment of the United Transportation Union (C) and (T) having jurisdiction or a member of the United Transportation Union designated by the General Chairman.

e. "'Local Chairman" means the Chairman of a regularly constituted Local Committee of Adjustment of the United Transportation Union (C) and (T) having jurisdiction.

f. "General Chairman" means the Chairman of the regularly constituted General Committee of Adjustment of the United Transportation Union (C) and (T) signatory hereto.

* * *

RULE 24

TIME LIMIT AND PROCEDURES FOR HANDLING CLAIMS

a. Any claim for compensation alleged to be due arising out of the application or interpretation of this Agreement may be made by an employee or, on his behalf, by a duly accredited representative, and must be submitted in writing, in duplicate, to the officer of the Corporation designated to receive time claims, not later than 30 days from the date of occurrence on which the claim is based. The representative of the Corporation who receives the time claim must acknowledge receipt by dating,

signing and returning the duplicate copy to the claimant or the duly accredited representative who submitted the claim.

b. If a claimant is absent because of sickness, temporary disability, or vacation, the 30-day time limit will be extended by the number of days of such absence.

c. In order for a claim to be considered, the individual who files the claim, either the claimant or his duly accredited representative must furnish sufficient information on the time slip to identify the basis of claims, such as but not limited to:

1. Name, occupation, employee number, division.
2. Train symbol or job number.
3. On and off duty time.
4. Date and time of day work was performed.
5. Location and details of work performed for which claim is filed.
6. Upon whose orders work was performed.
7. Description of instructions issued to have work performed.
8. Claims being made, including rule under which claimed and reason supporting claims.

Items normally associated with the service time slip, such as conversion to Passenger Conductor's rate, deadheading, held at other than home crew base, meal allowance, and allowances under Rule 11 will be submitted as part of the service time slip.

d. If a claim for compensation alleged to be due is not submitted in the manner set forth and prescribed in

paragraphs "a" and "e" above, such claims will not be entertained or allowed. The improper submission of one claim will not invalidate other claims of like or similar nature. No monetary claim will be valid, unless the Claimant was available, qualified, and entitled to perform the work.

e. When a claim for compensation alleged to be due, presented in accordance with this Rule, is not allowed, or should payment be made for less than the full amount claimed, the claimant will be informed of the decision and reason therefor within 60 days from the date the claim is received. When not so notified, the claim will be allowed, but such payment will not validate any other such claims nor will such payment establish any precedent.

f. A claim for compensation, properly submitted, which has been denied, will be considered closed unless the Local Chairman, within 60 days from the date of denial, lists the claim in writing for discussion with the designated Labor Relations officer. When a claim for compensation is denied following such discussion, the Labor Relations officer will notify the Local Chairman in writing within 60 days from the date of such discussion. When not so notified, the claim will be allowed as presented, but such payment will not validate any other such claims nor will such payment establish any precedent.

g. A claim for compensation denied in accordance with paragraph "f" above will be considered closed unless, within 60 days from the date of the denial, the Local Chairman presents a written request to the Labor Relations officer for a Joint Submission.

h. A Joint Submission will consist of a Subject which will be the claim as submitted to the Labor Relations officer, a Joint Statement of Agreed Upon Facts, a Position of Employees and a Position of the Corporation.

If the parties are unable to agree upon a Joint Statement of Agreed Upon Fact, the Local Chairman may progress the claim as an Ex Parte Submission. An Ex Parte Submission will consist of a Subject which will be the claim as submitted to the Labor Relations officer, a Statement of Facts and a Position of the Employees.

i. 1. When a Local Chairman makes a request for a Joint Submission, he will prepare a proposed Joint Statement of Facts together with the Position of the Employees and submit it to the Labor Relations officer. If the proposed Joint Statement of Facts meets with the approval of the Labor Relations officer, the Labor Relations officer will complete the Joint Submission within 60 days from the date of receipt of the proposed Joint Statement of Agreed Upon Facts, by including the Position of the Corporation. Three copies of the completed Joint Submission will be furnished to the Local Chairman. Failure to complete the Joint Submission within the time limit set forth, the specific claim will be allowed as presented, but such payment will not validate any other such claims nor will such payment establish any precedent.

2. If the proposed Joint Statement of Facts does not meet with the approval of the Labor Relations officer, the Labor Relations officer will submit a revised proposed Joint Statement of Agreed Upon Facts to the Local Chairman. If the Local Chairman agrees with the revised proposed Joint Statement of Facts, he will notify the Labor Relations officer accordingly. The Labor Relations officer will complete the Joint Submission within 60 days from

the date of receipt of the approval of the Joint Statement of Agreed Upon Facts, by including the Position of the Corporation, and furnish three copies of the completed Joint Submission to the Local Chairman. Failure to complete the Joint Submission within the time limit set forth, the specific claim will be allowed as presented, but such payment will not validate any other such claims nor will such payment establish any precedent.

3. If the Local Chairman does not agree with the proposed revised Statement of Facts submitted to him by the Labor Relations officer and the claim is to be progressed as an Ex Parte Submission, the Local Chairman will so notify the Labor Relations officer in writing within 15 days from the date the Labor Relations officer forwarded the proposed revised Statement of Facts to the Local Chairman. The Local Chairman will complete and submit three copies of the Ex Parte Submission to the Labor Relations officer within 30 days from the date of his notification to the Labor Relations officer of his intent to progress an Ex Parte Submission. Failure to complete the Ex Parte Submission within the time limit set forth herein, the claim will be considered closed.

j. The General Chairman will have 60 days from the date on which the Joint Submission or Ex Parte Submission is completed in which to list the claim, in writing, with the highest appeals officer, for discussion. If the claim is not listed within 60 days from the date the submission is completed, the claim will be considered closed.

k. When a claim for compensation properly progressed in accordance with this Rule is not allowed following discussion between the General Chairman and the

highest appeals officer, the highest appeals officer will notify the General Chairman of his decision, in writing, within 90 days from the date of such discussion. When not so notified, the claim will be allowed as presented, but such payment will not validate any other such claims nor will such payment establish any precedent.

l. The decision of the highest appeals officer of the Corporation will be final and binding unless within six months from the date of that decision the highest appeals officer is not notified in writing that his decision is not accepted. In the event of such notification, the claim will become invalid unless, within one year from the date of the decision by the highest appeals officer, the claim is disposed of on the property or submitted to a tribunal having jurisdiction pursuant to law or agreement, unless the parties mutually agree to other proceedings for final disposition of the claim.

m. The time limit provisions in this Rule may be extended at any level of handling in any particular claim by mutual consent in writing by the duly authorized officer of the Corporation and the duly accredited representative of the Organization.

n. The time limits set forth herein do not apply in discipline cases.

RULE 25

DISCIPLINE

a. Employees will not have a reprimand noted on their discipline records nor be suspended or dismissed from service without a fair and impartial trial.

b. When a major offense has been committed an employee considered by management to be guilty thereof may be held out of service pending trial and decision. A major offense is generally recognized as:

1. dishonesty, including falsification of reports or other documents;
2. extreme negligence;
3. use or possession of alcoholic beverages, intoxicants, narcotics; or
4. disorderly or immoral conduct, or any offence bringing discredit upon the Corporation.

c. 1. An employee who is required to make a statement prior to the trial in connection with any matter which may eventuate in the application of discipline to any employee may, if he desires to be represented, be accompanied by a duly accredited representative. A copy of his statement, if reduced to writing and signed by him, will be furnished to him by the Corporation upon his request and to the duly accredited representative when requested. Only one such statement may be required.

2. Employees who are required to attend investigation immediately after having finished work, or just prior to reporting for work and who do not thereby lose time on their assignments or extra boards, will be allowed continuous time at their regularly hourly rate for the time spent in attending the investigation, unless they are found guilty of the offense involved.

3. If an employee is required to lose time in order to make such statement and is not assessed discipline in connection with the incident involved, he will be paid the greater of the amount actually earned on the

date/dates of such statement and the amount he would have earned had he not been required to make the statement.

4. If required to attend investigation at other than the times mentioned in paragraph "2" hereof, and without losing time thereby on their assignments or extra boards, they will be compensated a minimum of eight hours at the rate of the last service performed for the time spent attending investigation, unless they are found guilty of the offense involved.

5. No payment except such as may be required under paragraph "1," "2" or "3" of this Rule will be made to employees for any traveling necessary to attendance at investigation.

6. Except when held off duty because of a major offense, extra employees required to attend investigation will retain their relative standing on the extra board.

7. This Rule will apply to employees required to attend trial and also to employees required to attend investigation or trial as witnesses.

d. An employee, who is accused of an offense and who is directed to report for a trial therefor, will be given reasonable advance notice in writing of the specific charge on which he is to be tried and the time and place of the trial.

e. Formal trials, except those involving a major offense, may be dispensed with should the employee involved and/or the Local Chairman and an authorized officer of the Corporation, through informal handling, be able to resolve the matter to their mutual interests. Requests

for informal handling must be made at least 24 hours before a formal trial is scheduled to begin. No formal transcript statement or recording will be taken at the informal handling. When a case is handled informally and the matter of responsibility and discipline to be assessed, if any, is resolved, no formal trial will be required. A written notice of the discipline assessed and the reason therefor will be issued to the employee responsible, with a copy to the Local Chairman, if he participated in the informal handling, at the conclusion of the informal handling. Discipline matters resolved in accordance with this paragraph are final and binding.

f. Trials on matters which involve employees held out of service will be scheduled to begin within ten (10) days following date the accused is first held out of service. If not so scheduled, the charge will become null and void, and the employee will be paid the amount he would have earned had he not been held out of service.

This time limit is subject to the availability of the accused and witnesses to attend trial and will be extended by the equivalent amount of time the accused employee and necessary witnesses are off duty account of sickness, temporary disability, discipline, leave of absence or vacation.

The ten (10) day time limit may be extended by mutual agreement, in writing between the Corporation and the accused employee or his duly accredited representative.

g. Trials on matters which do not involve employees being held out of service will be scheduled to begin within twenty (20) days from the date of management's first knowledge of such matters. If not so scheduled, the charge

will become null and void. This time limit is subject to the availability of the accused and witnesses to attend the trial and will be extended by the equivalent amount of time the accused employee and necessary witnesses are off duty account of sickness, temporary disability, discipline, leave of absence or vacation.

The twenty (20) day time limit may be extended by mutual agreement, in writing, between the Corporation and the accused employee or his duly accredited representative.

h. If an employee desires to be represented at a trial, he may be accompanied by a duly accredited representative. The accused employee or his duly accredited representative will be permitted to question witnesses and those conducting the trial insofar as the interests of the employee are concerned. Such employee will make his own arrangement for the presence of the said representative, and no expense incident thereto will be borne by the Corporation.

i. A true copy of the trial record will be given to the accused employee and to the duly accredited representative who accompanied the employee at the trial.

j. If discipline is to be imposed following trial and decision, the employee to be disciplined will be given a written notice thereof within fifteen (15) days of the date the trial is completed, and at least fifteen (15) days prior to the date on which the discipline is to become effective, except that in cases involving major offenses discipline may be made effective at any time after decision without advance notice.

The fifteen (15) day time limit to give written notice of discipline may be extended by mutual agreement, in writing, between the Corporation and the accused employee, or his duly accredited representative.

If no discipline is imposed following the trial and the employee was required to lose time as a result of such trial, he will be paid the greater of the amount actually earned on the date/dates of the trial and the amount he would have earned had he not attended the trial.

k. 1. Except where a major offense has been committed, if the discipline to be imposed is suspension, its application will be deferred unless within the succeeding six (6) month period; the accused employee commits another offense for which discipline by suspension is subsequently imposed.

2. The six (6) month period in paragraph "k1" will hereinafter be referred to as the probationary period.

3. Probationary periods will commence as of the date of the employee is notified, in writing, of the discipline imposed.

4. If the disciplined employee maintains a record clear of offenses during the probationary period, he will not be required to serve the suspension. In all cases the suspended discipline will remain on the employee's record with the notation, "Suspension deferred."

5. If within the probationary period, the employee commits another offense, for which discipline by suspension is subsequently imposed, the suspension that was held in abeyance in paragraph "k1" will be applied when discipline is imposed for such other offense and a new period

of probation will be started in connection with the subsequent offense.

6. Discipline by dismissal and suspension where a major offense has been committed will not be subject to the probationary period.

7. If the discipline to be applied is suspension, the time an employee is held out of service, and time lost making a statement and attending trial, will be:

A. Applied against the period of suspension for the offense when the suspension is actually served.

B. Considered time lost without compensation if the employee does not serve the suspension due to compliance with paragraph "k4."

l. An employee who considers that an injustice has been done him in discipline matters and who has appealed his case in writing to the designated officer of the Corporation within fifteen (15) days will be given a hearing.

This appeal, where the discipline imposed is suspension, will act as a stay (except in the case of a major offense) in imposing the suspension until after the employee has been given a hearing.

m. At hearings on appeals, an employee may, if he desires to be represented at such hearings, be accompanied, without expense to the Corporation, by a duly accredited representative.

n. The designated officer of the Corporation will advise the employee of the decision, in writing, within fifteen (15) days of the date the appeal is heard. If an employee is not so advised, the appeal will be considered as having

been sustained. This time limit may be extended by mutual agreement, in writing, between the designated officer of the Corporation and the accused employee or his duly accredited representative. If the decision, in cases of suspension, is to the effect that suspension will be imposed, either in whole or for a reduced period, the stay referred to in paragraph "a" will be lifted and suspension imposed subject to the provisions of Rule 25, paragraph "k."

o. Further appeal will be subject to the procedural provisions of paragraphs "g," "h," "i," "j" and "k" of Rule 24, except that in appealing cases involving discipline of dismissal, the General Chairman must, within 60 days after the date the decision is rendered by the Labor Relations officer, make an appeal in writing to the highest appeals officer of the Corporation requesting either that he be given a written response or that the case be held in abeyance pending discussion in conference with the highest appeals officer of the Corporation. When a written response is requested, the highest appeals officer of the Corporation will give written notification of his decision to the General Chairman within 60 days after the date of his receipt of the appeal. When a request is made for the case to be held in abeyance pending discussion in conference, the conference will be arranged within 60 days after the highest officer of the Corporation receives the request for a conference. The highest appeals officer of the Corporation will give written notification of his decision to the General Chairman within 60 days after the date of the conference.

p. Decision by the Director, Labor Relations will be final and binding unless, within sixty (60) days after

written notice of the decision, said officer is notified in writing that the decision is not acceptable.

All appeals from the decision of the Director, Labor Relations will be barred unless, within one hundred twenty (120) days from the date of said officer's decision, proceedings are instituted by the employee before a tribunal having jurisdiction pursuant to law or agreement over the matter involved.

q. If at any point in this appeals procedure or in proceedings before a tribunal having jurisdiction it is determined that the employee should not have been disciplined, any charges related thereto entered in the employe's personal service record will be voided and, if held out of service (suspended or dismissed), the employee will be reinstated with pay for all time lost and with seniority and other rights unimpaired.

r. If at any point in this appeals procedure or in proceedings before a tribunal having jurisdiction it is determined that the discipline imposed should be modified, the employee will be paid for all time lost in excess of such modified discipline.

s. The time limit provisions in this Rule may be extended at any level of handling in any particular case by mutual consent in writing by the duly authorized officer of the Corporation and the duly accredited representative of the Organization.

• • •

UNION SHOP

a. All employees of the Corporation subject to this Agreement will, as a condition of their continued employ-

ment, become members of the United Transportation Union within sixty (60) calendar days of the date they first perform compensated service and will maintain membership in good standing while subject to this Agreement; provided, however, that the foregoing requirement for membership in the United Transportation Union will not be applicable to:

1. Employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member, or

2. Employees to whom membership has been denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership in the United Transportation Union, or

3. Employees covered by this Agreement who maintain membership in any one of the other labor organizations, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in engine, train, yard or hostling service; provided, that nothing contained in this Rule will prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

b. Employees who retain seniority under this Agreement who are assigned or transferred for a period of thirty (30) calendar days or more to employment not covered by this Agreement, or who are on leave of absence

for a period of thirty (30) calendar days or more, will not be required to maintain membership as provided in paragraph "a" of this Rule so long as they remain in such other employment, or on such leave of absence, but they may do so at their option. If and when such employees return to any service covered by this Agreement, they will, as a condition of their continued employment, comply with the provisions of paragraph "a" of this Rule within thirty (30) calendar days of such return to service.

c. An employee whose membership in the United Transportation Union is terminated while on furlough due to reduction in force, or while off duty on account of sickness or injury for a period of thirty (30) calendar days or more, and who is required to maintain membership under the provisions of paragraph "a" of this Rule, will be granted upon his return to service in any of the crafts or classes represented by the United Transportation Union a period of thirty (30) calendar days within which to become a member of the United Transportation Union.

d. Every employee required by the provisions of this Rule to become and remain a member of a labor organization will be considered by the Corporation to be either a member of the United Transportation Union or to be a member of any one of the other labor organizations referred to in paragraph "a," unless the Corporation is advised to the contrary in writing by the United Transportation Union. The United Transportation Union will be responsible for initiating action to enforce the terms of this rule.

e. 1. The General Chairman will, between the fifteenth day and the last day of any calendar month, fur-

nish to the District Manager—Labor Relations involved, in writing and in duplicate, the name and roster number of each employee whose seniority and employment the United Transportation Union requests be terminated by reason of failure to comply with the membership requirements of this Rule.

2. In the event that the District Manager - Labor Relations wishes to dispute the correctness of the United Transportation Union's position, he will so notify the General Chairman within ten (10) calendar days of receipt of the notice from the latter, stating the reasons therefor. If no such exception is taken by the District Manager - Labor Relations or if the General Chairman does not withdraw the notice within ten (10) calendar days from the date of the District Manager's notice of exception, the District Manager - Labor Relations will transmit to the employee at his last known address through registered United States mail with return receipt requested, the original of the General Chairman's notice, accompanied by an explanatory letter.

3. Within ten (10) calendar days from the date of the District Manager - Labor Relations' mailing notice to the employee, as provided in paragraph "e2," the said employee's seniority and employment in the crafts or classes represented by the United Transportation Union will be terminated, unless the notice is withdrawn by the United Transportation Union in the interim, or unless a proceeding under the provisions of paragraph "g" of this Rule is instituted.

f. The provisions of this Agreement pertaining to investigations, trials and appeals are inapplicable to the

termination of seniority and employment provided for in this Rule.

g. 1. For the sole purpose of handling and disposing of disputes arising under this Rule, a System Board of Adjustment is hereby established, in accordance with Section 3, Second, of the Railway Labor Act, as amended, which will consist of four members, two to be appointed by the Corporation and two by the United Transportation Union.

2. An employee notified in accordance with the provisions of paragraph "e" that he has failed to comply with the membership requirements of this Rule and who wishes to dispute the fact of such failure will, if he submits request to the Secretary of the System Board of Adjustment within a period of ten (10) calendar days from the date of mailing of such notice, be given a hearing. The Secretary of the Board will notify the employee in writing the time and place at which such hearing will be held. The hearing will be confined exclusively to the question of the employee's compliance with the provisions of this Rule. The employee will be required at this hearing to furnish substantial proof of his compliance with the provisions of this Rule.

3. The decision of the System Board of Adjustment will be by majority vote and will be final and binding.

4. In the event the System Board of Adjustment is unable to reach a decision, the matter will be submitted to a neutral arbitrator to be selected by the National Mediation Board, whose decision as to whether or not the employee has complied with the provisions of this Rule will be final and binding.

5. Receipt by the Secretary of the Board of notice from an employee that he wishes to dispute the charge that he has failed to comply with the membership requirements of this Rule will operate to stay action on the termination of his seniority and employment pending final decision and for a period of ten (10) calendar days thereafter.

6. The fee and expenses of the neutral arbitrator, which will be limited to the amount regularly established by the National Mediation Board for such service, will be borne equally by the Corporation and the United Transportation Union.

h. 1. No provision of this Rule will be used as a basis for a grievance or time or money claim against the Corporation, nor will any provision of any other agreement between the Corporation and the United Transportation Union be relied upon in support of any claim that may arise as the result of the operation of this Rule.

2. In the event that seniority and employment in the crafts or classes covered by this Rule are terminated under the provisions of this Rule, and such termination of seniority and employment is subsequently determined to be improper, the employee whose seniority and employment was so terminated will be returned to service in said crafts or classes without impairment of seniority rights. In the event an employee brings an action for allegedly wrongful discharge, the United Transportation Union and the Corporation will share equally any liability imposed in favor of such employee, except in a case where the Railway Labor Act, as amended, and this Rule under it are held by a court of competent jurisdiction to be illegal or unconstitutional or in violation of State Statutes; or where

the Corporation is the plaintiff or moving party in any action; or where the Corporation acts in collusion or collaboration with an employee seeking damages, resulting from termination of his seniority and employment.

• • •

Signed at Washington, D.C., this 8th day of November, 1982.

For The National Railroad Passenger Corporation	For The United Transportation Union
/s/ G. F. Daniels, Vice President Labor Relations	/s/ C. P. Jones General Chairman
/s/ G. R. Weaver, Jr., Assistant Vice President, Labor Relations	/s/ W. A. Beebe General Chairman
/s/ J. K. Shoemaker, Assistant Vice President, Transportation	
/s/ H. R. Henderson, Deputy General Counsel	
/s/ L. D. Miller, Manager, Labor Relations	

• • •

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PAUL G. LANDERS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	CIVIL ACTION
NATIONAL RAILROAD	)	No. 84-467-K
PASSENGER CORPORATION	)	
and BROTHERHOOD OF	)	
LOCOMOTIVE ENGINEERS,	)	
	)	
Defendants.	)	

STATEMENT OF UNDISPUTED FACTS

The parties identify as the undisputed material facts in this case the following:

1. Plaintiff Paul G. Landers has been employed by Defendant National Railroad Passenger Corporation ("Amtrak") since January 1, 1983 as a Passenger Engineer.

2. Defendant Amtrak is a corporation created by the Rail Passenger Service Act of 1970, 45 U.S.C. § 541 *et seq.*, for the purpose of providing intercity rail passenger service within the United States. Pursuant to 45 U.S.C. § 546 (b), Amtrak is subject to federal labor statutes covering railroads and is a "carrier" as defined in Section 1, First of the Railway Labor Act, 45 U.S.C. § 151 First.

3. Defendant Brotherhood of Locomotive Engineers ("BLE") is an unincorporated association and a labor organization national in scope, organized in accordance

with the Railway Labor Act, and admits to membership railroad employees in the craft or classes of locomotive engineers and firemen. The BLE is a "representative" of employees within the meaning of the Railway Labor Act, 45 U.S.C. § 151. The BLE is qualified to and has appointed two labor members of the First Division at the National Railroad Adjustment Board under Section 3 of the Railway Labor Act. The BLE is the bargaining representative for the craft or class of passenger engineers employed by Amtrak, and effective January 1, 1983, has been a party to the written collective bargaining agreement with Amtrak for that craft or class. The BLE's agreement with Amtrak provides for rates of pay, hours of work, health and welfare benefits, seniority rights, and other terms and conditions of employment for the craft or class of passenger engineers. A true and correct copy of the agreement was attached as Exhibit "A" to the Complaint.

4. Among other things, the collective bargaining agreement entered into by BLE and Amtrak contains discipline and investigation rules, and machinery for resolution of disputes involving the interpretation and application of the provisions of the agreement covering the craft or class of passenger engineers. Rule 1e. defines the "duly accredited representative" as "the General Chairman of the Brotherhood of Locomotive Engineers having jurisdiction or any elected officer of the Brotherhood of Locomotive Engineers designated by the General Chairman." Rules 20 and 21 of the BLE agreement provide that a claim by a passenger engineer for compensation "may be made only by a claimant or, on his behalf, by a duly accredited representative"; that the passenger engi-

neer and "his duly accredited representative will have the right to be present during" disciplinary investigations; that the engineer or his duly accredited representative may process appeals of any claim, grievance, or disciplinary action; and that the General Chairman may process appeals at the final stage of handling with the highest officer of Amtrak designated to handle appeals. If unsuccessful at the company, the passenger engineer may progress his claim to binding arbitration before the First Division of the National Railroad Adjustment Board, where he "may be heard in person, by counsel, or by other representatives," as he may elect, in accordance with Section 3, First (j) of the Railway Labor Act, 45 U.S.C. § 153, First (j).

5. The United Transportation Union ("UTU") is an unincorporated association and a labor organization national in scope, organized in accordance with the Railway Labor Act and admits to membership railroad employees in the crafts or classes of locomotive engineers, firemen, conductors, trainmen and yardmen. The UTU is qualified to and has appointed two labor members of the First Division of the National Railroad Adjustment Board under Section 3 of the Railway Labor Act.

6. The UTU is the bargaining representative for the crafts of engine attendants, passenger conductors and assistant conductors employed by Amtrak. Since January 1, 1983, the UTU has been a party to written collective bargaining agreements with Amtrak for these crafts. The collective bargaining agreements entered into between Amtrak and UTU (C) and (T) for the crafts or classes of passenger conductors and assistant passenger conductors and between Amtrak and UTU (E) for the craft or class of engine attendants contain provisions for claims and grievance handling and representation at investigations. Similar to the provisions of the BLE agreement, these provisions define "duly accredited representative" to be the local chairman of the respective local unit of UTU "or a member of the UTU designated by the General Chairman," and designate the "duly accredited representative" to appear at investigations of conductors and engine attendants and to process any claims, grievances or appeals for that craft or class of employees.

7. No passenger engineer at Amtrak performs any services in or is temporarily transferred to any craft or class of service at Amtrak as to which the BLE is not the duly designated and authorized representative for purposes of the collective bargaining agreement or the Railway Labor Act. No Amtrak passenger engineer holds employment rights in any craft or class at Amtrak other than passenger engineer. No employee in any craft represented by the UTU on Amtrak hold seniority or employment rights in the craft of passenger engineers.

8. Prior to January 1, 1983, Amtrak's trains on the Northeast Corridor were operated by Conrail engineers pursuant to contractual arrangements between Amtrak and Conrail. Those engineers were employees of Conrail represented for purposes of collective bargaining by the BLE.

9. After January 1, 1983, Amtrak began employing passenger engineers on the Northeast Corridor, including Plaintiff Landers.

10. On approximately February 17, 1984, Plaintiff was charged with misconduct while performing his assignment as a passenger engineer. An investigatory hearing into these charges was conducted on February 28, 1984. At that hearing, Plaintiff appeared and represented himself. He had previously requested to be represented by the UTU, but was advised by Amtrak that under the terms of the collective bargaining agreement he could only be represented by a duly accredited representative of his craft.

11. On March 6, 1984, Amtrak concluded that the disciplinary charges against Plaintiff had been proven and assessed the Plaintiff 30 days actual suspension.

12. Plaintiff did not appeal his suspension to the National Railroad Adjustment Board.

13. Plaintiff's suspension has been served and he has returned to work as a passenger engineer.

Respectfully submitted,

Dated: July 31, 1985

/s/ Joanna L. Moorhead (WSM)
by /s/ Wm. Shaw McDermott
National Railroad Passenger Corporation
400 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 383-3971

Attorney for Defendant
National Railroad
Passenger Corporation

Dated: Oct. 9, 1985

/s/ Harold A. Ross (PFK)
by /s/ Paul F. Kelly
Harold A. Ross
Ross & Kraushaar Co., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
(216) 861-1313

Attorney for Defendant
Brotherhood of Locomotive
Engineers

Dated: Oct. 8, 1985

/s/ James F. Freeley, Jr.
Feeney & Freeley
183 State Street
Boston, Massachusetts 02109
(617) 523-5010

Attorney for Plaintiff
Paul G. Landers

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PAUL G. LANDERS,	)	
	)	
	)	
	)	
vs.	)	
	)	CIVIL ACTION
NATIONAL RAILROAD	)	No. 84-467-K
PASSENGER CORPORATION	)	
and BROTHERHOOD OF	)	
LOCOMOTIVE ENGINEERS,	)	
	)	
	)	

AFFIDAVIT OF PAUL G. LANDERS

1. My name is Paul G. Landers, 95 West Squantum Street, North Quincy, Massachusetts 02171. In May 1951 I went to work for the New York New Haven & Hardford Railroad in the mechanical division, Readville Shops, Boston, Massachusetts. When I was employed I became a member of the carrier's union as the railroad was under a union shop agreement with the employees.

2. In October 1955 I transferred to the operating department, New Haven Railroad as a locomotive fireman and joined another union the BLF & E at the same time. In 1968, the New Haven Railroad was merged with Pennsylvania Railroad and the New York Central forming the Penn Central which operated passenger and freight lines from Boston to Washington, in the so called Northeast Corridor. I was promoted to locomotive engineer in July 1969 and in that position I operated trains out of railroad yards in Massachusetts, Rhode Island and Connecticut.

3. I remained with Penn Central from 1968 until 1976 when Penn Central became Conrail as the result of federal legislation. Under the legislation, Conrail took over the Penn Central operation in the Northeast Corridor, including its freight and passenger service.

4. In 1977 I took a leave of absence from Conrail and went to work for the B&M, remaining there until 1982. Then I returned to Conrail and shortly thereafter was transferred to Amtrak effective January 1, 1983. Amtrak was formed in May 1971 but did not directly establish an operating division for the operation and servicing of passenger trains until January 1, 1983.

5. As an engineer for Amtrak I was assigned to the operating division of that railroad and carried out duties of a passenger engineer primarily in yard service.

6. On January 1, 1969 the UTU was formed by combining four different unions which included the firemen and engineers (my union), and three others all of which represented the operating crafts.

7. On January 1, 1971, I took office as Vice Local Chairman, Local 606 UTU, Providence, Rhode Island and in October 1971 I was elected Local Chairman. Since then I have held various offices in the UTU. Presently I hold the position of legislative representative, Local 14, UTU, Boston, Massachusetts and I am also secretary to the state legislative board. I was also elected delegate on three occasions to the UTU national convention. As a passenger engineer with Amtrak I also hold and accumulate seniority rights on Conrail which provided crews for Amtrak until the beginning of 1983.

8. The Northeast Rail Service Act mandated that on January 1, 1983 Conrail was relieved of the responsibility of providing crews for Amtrak's intercity passenger service in the Northeast Corridor. Section 1165 of the Act, 45 U.S.C. § 1113(a) provided that Amtrak shall negotiate with Conrail and the unions to utilize the services of certain employees who were given the right to move from one service to another once each six month period. Thereafter an agreement was reached between Amtrak, Conrail and BLE on October 20, 1982 to meet the purposes of § 1165 of the Act. I exercised my seniority rights and transferred to Amtrak as a passenger engineer on Janaury 1, 1983 as stated above.

9. At the present time I maintain rights in engine service pursuant to the Amtrak/Conrail/BLE agreement. I may seek retransfer back to Conrail every six months where I may exercise seniority rights in freight, yard and passenger service either as a locomotive engineer or fireman. The privilege to move back and forth to Conrail and assert seniority for an engineer or firemen position is referred to as "flow back".

10. I am familiar with procedures in grievances and disciplining on the railroads in the Northeast Corridor having been involved with them from the commencement of my employment, 1955 to date. I first attended disciplinary hearings sometime in 1955 or 1956 as an observer. I later represented employees. Under the practice at that time the employee could choose his own representative which generally and customarily was an official from the union in which he held membership.

11. The prior practice that I observed and participated in on the New Haven Railroad regarding representation of engineers in grievance and disciplinary hearings continued under Penn Central when the New Haven merged with it in 1968. The right of an employee to choose his own representative at a grievance or disciplinary hearing continued.

12. On two occasions, in 1969 and in the following year 1970, I was represented by the chairmen from my union, the UTU, at disciplinary hearings called against me by Penn Central. At the time the BLE was the bargaining agent under the collective bargaining contract for me as an engineer. I also represent engineers and firemen in disciplinary proceedings at Penn Central. When I worked for Penn Central in the Northeast Corridor in which Amtrak now operates I observed that the usual manner for handling discipline and grievances was to allow the engineers their choice of a firemen's or engineers' union for representation.

13. The three pre-1976 contracts between the BLE and the three predecessor railroads were continued under Penn Central and then imposed upon Conrail by statute on April 1, 1976 (45 U.S.C. § 774(a)). On January 1, 1979 a new agreement called the Conrail single system agreement was adopted for the engineers. The UTU continued to handle claims for engineers throughout this period. When I entered the employ of Conrail in 1976 the "usual manner" of handling cases as described above continued to be used. At no time did Conrail or the BLE challenge this practice. It was continued until 1983 and after Amtrak hired Conrail employees and undertook to conduct the passenger operations in the Northeast Corridor. During my term with Amtrak I personally handled two grievances for engineers who are members of Local 14, UTU.

To my knowledge this practice was in effect until February, 1984, when Amtrak advised me it would not allow Harry Malone to represent me at a hearing arising out of a charge of alleged rule violation that occurred on February 14, 1984.

14. I protested to Amtrak that its refusal to allow Mr. Malone to represent me at the company level hearings was illegal. Harry Malone is the chairman of Local 262, UTU aid state legislative director UTU. Because Mr. Malone was refused permission to participete in my proceedings I was compelled to represent myself.

15. Following an adverse decision by the carrier I did not choose to appeal the result to the Public Law Board. The 30 day ssuspension and loss of pay for that period was a great concern to me. However, of greater concern was the arbitrary action by Amtrak which, without advance warning or right and in contravention of all prior usage, denied me my basic right of free choice of representation which all railroad employees have enjoyed since 1955. I did not hear from the BLE and the BLE did not appear at the proceedings. Likewise it failed to offer me aid or moral support of assistance of any kind.

16. As a union official and personnel I feel that the denial of representation of my own choice at the disciplinary hearing was a violation of the basic rights of UTU engineers.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 5th DAY OF November, 1985.

/s/ Paul G. Landers

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PAUL G. LANDERS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	CIVIL ACTION
NATIONAL RAILROAD	)	No. 84-467-K
PASSENGER CORPORATION	)	
and BROTHERHOOD OF	)	
LOCOMOTIVE ENGINEERS,	)	
	)	
Defendants.	)	

SUPPLEMENTAL AFFIDAVIT OF J. P. CARBERRY

STATE OF OHIO	)	
	)	SS:
COUNTY OF CUYAHOGA	)	

J. P. CARBERRY, being first duly sworn, deposes and says:

1. I am a Vice President of the International Brotherhood of Locomoitve Engineers ("BLE") and previously submitted an affidavit in this matter.

2. Contrary to the implication plaintiff Landers attempts to create, Amtrak does not have any locomotive firemen. It has engine attendants. These engine attendants are not requirel to qualify as engineers. Amtrak engine attendants are not promotable, nor do they work as engineers on Amtrak.

3. There is no shuttling back-and-forth between the craft of locomotive engineers represented by BLE and the craft of engine attendants represented by UTU-E. If an Amtrak engineer cannot hold a job as such on Amtrak,

he may return to Conrail as an engineer represented by BLE. He does not return to Conrail as a fireman. In fact, he cannot elect to work in the craft of firemen; he can only work in that craft if he cannot hold any job as an engineer. If an Amtrak engine attendant cannot hold a job as such on Amtrak, he may return to Conrail as a fireman-hostler, which craft is represented by UTU-E.

4. Moreover, it is quite clear that plaintiff Landers, if working on Conrail, would never shuttle back-and-forth between the crafts of engineers and firemen-hostlers. He is and has been a locomotive engineer for a number of years; he has not worked as a fireman-hostler on Conrail for years; his seniority ranking is such that he would not likely ever work as a fireman again. Since there is no promotion and demotion practices between the crafts of engineers and engine attendants on Amtrak, there is no question that when working for Amtrak, Landers will never shuttle back-and-forth between a craft represented by BLE and a craft represented by UTU.

5. Furthermore, engineers do not have any right to engine attendant jobs on Amtrak. All engine attendants on Amtrak must come from the ranks of Conrail's firemen-hostlers. In other words, the individual must go from a UTU-represented craft to a UTU-represented craft.

6. In the event that the complement of Amtrak engineers is insufficient to handle the number of trains operated by Amtrak, the vacancies are filled by Conrail engineers. In this instance, the individual flows from a BLE-represented craft, albeit on the one railroad, to a BLE-represented craft of another railroad. There just is no way that the Amtrak engineer or Amtrak engine attendant can float between a BLE-represented craft and a UTU-represented craft.

7. Contrary to the statements of plaintiff, there have been no normal and customary practices in the industry on handling claims or disciplinary investigations following the abrogation of the Chicago Agreement between the former Brotherhood of Locomotive Firemen and Enginemen and BLE in 1928, or currently. Under the § 1165 agreement mentioned in my previous affidavit, any transfer from Amtrak to Conrail is limited to 10% of the engineers twice a year, so that no more than 30 individuals at a maximum could be involved in such transfers. It has been less. Definitely, there has been no ebb-and-flow between the craft of engineers on Amtrak represented by BLE with the same craft represented by BLE on Conrail, as occurred between the crafts of engineers and firemen when the union shop provision was enacted in 1951. Moreover, although Conrail adopted the bargaining agreements in effect on the constituent lines when it took them over April 1, 1976, Conrail would not permit UTU to take engineer cases to a UTU created special board of adjustment from the time Conrail entered into the single agreement with BLE in 1979 until October 13, 1983, when Conrail and UTU allegedly agreed to change this policy. I have objected to removal of UTU cases from BLE Special Board No. 894. A copy of my objection to the National Mediation Board on November 15, 1983 is attached hereto as Exhibit 1.

8. From 1972 to 1977 and from shortly prior to January 1, 1983, plaintiff was an employee of Penn Central and later Conrail. Those railroads operated passen-

ger service for Amtrak under an operating arrangement. Throughout this period, Landers was employed by and working under the rules and conditions of employment set by Penn Central or Conrail. Any grievances handled for him at those times would have no meaning or value, since there was no collective bargaining agreement with Amtrak setting forth a discipline investigation procedure or a grievance process. On the other hand, Conrail officials operated the entire show up to December 21, 1982.

9. There have never been any tripartite agreements between Amtrak, BLE and UTU. On Amtrak, the usual manner has been set forth in the agreements which became effective on January 1, 1983.

10. In arbitration proceedings, the neutral referee is not bound by the interpretation placed upon the contractual provision by the union and company signatory to the collective bargaining agreement. Therefore, if a rival organization is permitted to process grievances and take them to arbitration before a special board created by it, the rival union can, in essence, negotiate on the terms contained in the working agreement, and may take disputes to arbitration in order to embarrass the duly authorized bargaining representative and to stir up representation disputes, which lead to instability and turmoil in labor relations.

11. In its agreements with Amtrak, Metro-North, Southeastern Pennsylvania Transportation Authority, and many other railroads, UTU has limited representation to "accredited representative" which is always defined as a UTU official. UTU adheres to that provision, and the

provision is set forth in its agreements on Amtrak, including its agreement for engine attendants.

/s/ J. P. Carberry

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PAUL G. LANDERS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	CIVIL ACTION
NATIONAL RAILROAD	)	No. 84-467-K
PASSENGER CORPORATION	)	
and BROTHERHOOD OF	)	
LOCOMOTIVE ENGINEERS,	)	
	)	
Defendants.	)	

AFFIDAVIT OF E. J. FISETTE

Personally appeared before the undersigned attesting officer, duly authorized to administer oaths, E. J. Fisette, who after first being sworn, states that the following facts are true and correct and within his personal knowledge.

1. I am presently employed at the National Railroad Passenger Corporation ("Amtrak") as District Manager, Labor Relations. My responsibilities in this position include functioning as the Corporation's "authorized officer" to handle appeals from labor organizations, including the United Transportation Union and the Brotherhood of Locomotive Engineers, in claims, grievances and discipline cases. I am familiar with the provisions in Amtrak's collection bargaining agreements with both of these labor organizations.

2. On May 17, 1983, I received a memorandum from Mr. G. R. Weaver, Jr., Assistant Vice President, Labor

Relations. A true and accurate copy of that memorandum was attached to the Affidavit of John Livingood previously submitted to the Court. This memorandum specifically defined the term "duly accredited representative" as referred to in Rule 1 of the collective bargaining agreements with the Brotherhood of Locomotive Engineers and the United Transportation Union. I was instructed to ensure that all persons under by supervision were aware of the application of these agreements and that we must deal only with the proper representatives as defined in the respective agreements.

3. In the handling of appeals, the standard operating procedure in my office is to acknowledge receipt of said appeal by formal written correspondence to the duly accredited representative who has progressed the issue. At the same time, my office schedules an appeal conference. The appeal is given an identification number and that number is designated in the acknowledgement letter.

4. I am aware that Mr. Landers sent in two letters identified as "appeals" with regard to engineers J. T. Blake and D. H. King. These letters were not recognized as proper appeals and there was no official correspondence of any kind sent to Mr. Landers. Exhibit 1 attached hereto is a true and accurate copy of a letter sent under my signature to Mr. J. T. Blake; it makes no mention of Mr. Landers. Had Mr. Landers' letter been recognized as a proper appeal, correspondence would have been directed to him rather than to the employee. No appeal conference was set with Mr. Landers. My office took action with regard to the vacation entitlements of Mr. Blake and Mr. King as we did with all such legitimate complaints

arising from clerical or transmission errors occurring during the initial period after the assumption of functions from Conrail. Actual disputes involving matters other than such issues as vacation entitlements which, at that time, often resulted from clerical errors, were handled on a more formal basis. For example, when ("UTU") Local Chairman, W. A. Adams, pursued a claim for holiday pay for Engineer H. St. Leger, formal notification was sent to Mr. Adams advising him that because he was not a "duly accredited representative", Amtrak could not consider the claim valid as submitted. Similarly, ("BLE") representative, Mr. F. E. Huggan was given the same information in my May 17, 1985 correspondence when he attempted to process a claim in behalf of a member of the ("UTU"). A true and accurate copy of my letters to Mr. Adams and Mr. Huggan are annexed hereto as Exhibit 2.

5. In the railroad industry, trackage rights arrangements are made in which a carrier is allowed to run its trains over tracks owned by other railroads. For example, Conrail runs its trains over Amtrak's Northeast Corridor tracks. The normal industry practice when an operating employee violates one of the operating or safety rules of the carrier owning the tracks, is for that carrier to hold the investigation, even though the employee in question is not an employee of the carrier or governed by the carrier's own collective bargaining agreements. Thus, if a Conrail engineer violated Amtrak's operating rules while moving Conrail equipment over Amtrak lines, Amtrak would hold the disciplinary hearing. Such a hearing occurred with regard to Conrail engineer A. Gamboa on May 30, 1984. This hearing was not conducted pursuant to the Amtrak-Brotherhood of Locomotive Engineers

agreement. Rather, because Mr. Gamboa was a Conrail engineer at the time, the investigation was held under Conrail rules by an Amtrak hearing officer. Because under the Conrail bargaining agreement, the United Transportation Union is allowed to represent engineers, Mr. Landers was allowed to represent Mr. Gamboa. Allowing Mr. Landers to represent Mr. Gamboa under the Conrail-BLE agreement was not in conflict with Amtrak's policy, as reflected in Amtrak's bargaining agreements with the BLE and UTU, of only allowing duly accredited representatives to act on behalf of Amtrak engineers, conductors and engine attendants.

/s/ E. J. Fisette

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PAUL G. LANDERS,	)	
	)	
Plaintiff,	)	
	)	
	)	CIVIL ACTION
v.	)	No. 84-467-K
	)	
NATIONAL RAILROAD	)	
PASSENGER CORPORATION	)	
and BROTHERHOOD OF	)	
LOCOMOTIVE ENGINEERS,	)	
	)	
Defendants.	)	

AFFIDAVIT OF R. A. HERZ

Personally appeared before the undersigned attesting officer, duly authorized to administer oaths, Richard A. Herz, who after first being sworn, states that the following facts are true and correct and within his personal knowledge.

1. I am presently employed at the National Railroad Passenger Corporation ("Amtrak") as Supervisor, Labor Relations in New Haven, Connecticut. I work under the supervision of Mr. E. J. Fisette, who is the authorized officer of the Corporation in the Boston Division designated to handle appeals in claims, grievances and discipline cases involving employees represented by labor organizations, including the United Transportation Union ("UTU") and the Brotherhood of Locomotive Engineers ("BLE").

2. The Northeast Rail Service Act relieved Conrail of the responsibility for providing train and engine crews

to Amtrak for intercity passenger service on the Northeast Corridor. Pursuant to Section 1165 of the Act, 45 U.S.C., 1113(a), Amtrak, Conrail, and the Brotherhood of Locomotive Engineers reached an agreement providing the terms and condition by which Conrail engineers became passenger engineers for Amtrak. A similar agreement was reached with the United Transportation Union providing the terms and conditions by which Conrail employees represented by the UTU became conductors, assistant conductors, and engine attendants at Amtrak. The takeover of all of these employees was effective on January 1, 1983.

3. The takeover of such a large number of employees was a sizeable task and involved the exchange of individual employee personnel records, disciplinary records, records of seniority, qualifications, vacation entitlements, restrictions, etc. The New Haven Labor Relations department was instructed to assist the Transportation and Personnel Departments in any way necessary to facilitate the transition.

4. I worked for Conrail in its New Haven Labor Relations office prior to accepting employment with Amtrak on January 1, 1982. Because of that relationship I not only had specialized experience in train and engine agreements but also had familiarized myself with key people, both management and union officials, on that railroad. For that reason I assumed many of the coordinating responsibilities in the initial takeover.

5. In early August, 1983, Mr. Paul Landers called me at the office and related that he was having a problem with the vacation of one of "his people", Mr. J. T.

Blake, Jr. Mr. Landers and I had known one another when I worked for Conrail where he represented engine service employees. Mr. Landers indicated that Mr. Blake had taken a vacation for one week beginning on July 25, 1983 and had been denied vacation payment. At the end of the conversation I asked him to get as much information as possible for me to expeditiously handle the matter. There was no conversation concerning the representation issue at that time. I knew that Mr. Landers had handled engineer appeals on Conrail and I did not give any thought to his particular affiliation during our telephone conversation at that time. My primary concern was the well-being of an engineer who may have been denied pay for an entire week due to a probable clerical error.

6. On August 11, 1985, Mr. Fisette received correspondence from Mr. Landers "appealing" the denial of vacation pay for engineer Blake. I subsequently had telephone discussions with Mr. Landers to the effect that I could not accept his "appeal" as presented due to his not being designated as a duly accredited representative of BLE. I believe that Mr. Landers understood my position, although it was quite clear that he was not in agreement. However, requiring Mr. Blake or the BLE to write an additional letter would have resulted in unnecessary delays and therefore I agreed informally to investigate the matter and ensure that Mr. Blake received his vacation pay, if entitled, without the necessary paperwork involved in a formal appeal.

7. Mr. Blake was only one of a number of employees whose vacation eligibility appeared to be inconsistent with their length of service. Since the problem was of such great proportion. I often handled these matters on the

basis of telephone calls rather than a formal appeal in order to expedite matters. There was only a few months left in the year to take vacations if an employee was found to be entitled to additional weeks of vacation. On September 7, 1983, Mr. Fisette sent a letter to Conrail asking for assistance in reviewing vacation entitlements not only for Mr. Blake but eighteen other employees who we had identified as having similar problems. A true and accurate copy of that letter as contained in my files is annexed hereto as Exhibit 1.

8. I believe that I may have had one more conversation with Mr. Landers and that I spoke to engineer Blake directly in the interim. A letter from Mr. Fisette to Mr. Blake was sent on September 7, 1983. In this letter there was no mention of Mr. Landers' letter of appeal since the Corporation could not legitimately recognize it to be a proper appeal.

9. On October 14, 1983, Mr. Fisette received another letter claiming to be an "appeal" from Mr. Landers concerning the vacation eligibility of engineer D. H. King. Mr. Landers and I had another telephone conversation during which I assured him that I would investigate Mr. King's vacation eligibility as I had Mr. Blake's. In fact, Mr. Blake's name had been one of the eighteen employees identified in Mr. Fisette's September 7 letter to Conrail. As was the case with the Blake letter, the Corporation did not formally acknowledge receipt of the "appeal". I also did not respond in any official capacity to Mr. Landers. Although I did send an informal note to Mr. Landers with regard to the resolution of both the King and the Blake vacation entitlements, this was not

done on official stationery but rather as a personal note on note paper.

10. To my knowledge, the New Haven Labor Relations office has not received any further official correspondence from Mr. Landers since the King letter.

/s/ R. A. Herz
11-27-85

(Jurat omitted in printing)

NOTATION REGARDING OPINIONS, JUDGMENTS, ORDERS, AND DECISIONS

The relevant opinions, judgments, orders, and decisions noted below appear in the Appendices to the Petition for Writ of Certiorari filed June 19, 1987, at the pages indicated.

PETITIONER'S

BRIEF

No. 86-2037

In The
Supreme Court of the United States
October Term, 1986

PAUL G. LANDERS,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE PETITIONER

CLINTON J. MILLER, III
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(216) 228-9400

Counsel for Petitioner

QUESTION PRESENTED

May a railroad operating employee who satisfies a union membership requirement in a collective bargaining agreement by paying dues to a traditional operating union, national in scope, as permitted by Section 2 Eleventh(c) of the Railway Labor Act (45 U.S.C. § 152 Eleventh(c)), be deprived of his union's assistance in disciplinary proceedings and appeals on the property of the railroad?

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 814 F.2d 41, and the memorandum opinion of the District Court for the District of Massachusetts, not officially reported, appear in the Appendix to the Petition (hereinafter designated "Pet. App.") at 1a-17a and 19a-33a, respectively.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1987. (Pet. App. at 18a) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Court granted the petition for writ of certiorari on November 30, 1987, and upon application by petitioner, extended the time within which to file this Brief to January 28, 1988.

STATUTE INVOLVED

The statute involved in this proceeding is the Railway Labor Act (45 U.S.C. § 151, *et seq.*), pertinent portions of which have been set forth at Pet. App. 35a-44a.

STATEMENT OF THE CASE

A. The Parties and Proceedings Below

On February 21, 1984, Paul G. Landers ("Landers"), who is an employee of the National Railroad Passenger Corporation ("Amtrak"), in the craft of passenger engineer, and who is a member of the United Transportation Union ("UTU"), although engineers are represented on Amtrak for purposes of co..tract negotiation by the Brotherhood of Locomotive Engineers ("BLE"), filed this action. The Complaint was filed to enforce Landers' right to have his discipline case and grievances handled by UTU as his selected representative, both on the property of Amtrak and at the National Railroad Adjustment Board under Section 3 First of the Railway Labor Act ("RLA") (45 U.S.C. § 153 First) or a public law board created by Amtrak and UTU under Section 3, Second of the Railway labor Act (45 U.S.C. § 153 Second). The Complaint is reproduced in the Joint Appendix (hereinafter designated "Jt. App.") at 3-8.

The Complaint claimed that Amtrak denied those rights to Landers as a member of UTU in violation of Sections 2 and 3 of the RLA. (45 U.S.C. §§ 152 and 153). Amtrak relied on the agreement for the craft of Engineers it had with BLE. The Complaint further claimed that the exclusive representation provisions of that agreement, restricting discipline and grievance handling to BLE even for members of UTU, violates the RLA. BLE was joined as a party pursuant to *Fed. R. Civ. Pro.* 13 (*Id.*).

After Answers to the Complaint by BLE (Jt. App. at 9-12) and Amtrak (Jt. App. at 13-16), BLE filed a motion to dismiss or for summary judgment on October 7, 1985, asserting that the Court lacked jurisdiction because it was a representation dispute within the exclusive jurisdiction of the National Mediation Board under 2 Ninth of the RLA (45 U.S.C. § 152 Ninth), or was a "minor dispute" within the jurisdiction of the National Railroad Adjustment Board under 3 First of the RLA (45 U.S.C. § 153 First), which Landers had failed to exhaust as a remedy. The motion was supported by the Affidavit of J.P. Carberry (Jt. App. at 17-27), which included as attachments, *inter alia*, copies of the BLE-Amtrak Agreement (portions appear in Jt. App. at 28-46) and the UTU-Amtrak Agreement (portions appear in Jt. App. at 47-67).

The parties filed a statement of undisputed facts on October 11, 1985. (Jt. App. at 67-73). A civil non-jury trial was held on November 19, 1985, and April 2, 1986. Additional affidavits were filed by the parties in November and December, 1985. (Jt. App. at 74-92).

On June 24, 1986, the district court in its Memorandum and Order rejected the jurisdictional arguments of BLE and Amtrak, but nonetheless granted judgment against Landers on the basis of its construction of Section 3 of the Railway Labor Act that it was permissible for an exclusivve representation clause to exist thereunder for discipline and grievance handling on the property. (Pet. App. at 19a-33a). The order of the same date granted judgment in favor of Amtrak and BLE and against Landers, and was filed on June 27, 1986. (Pet. App. at 34a). On appeal, the First Circuit affirmed (Pet. App. at 1a-17a).

B. Facts

The statement of undisputed facts (Jt. App. at 68-73) accurately reflects the facts in the case at bar. That statement establishes the following.

Landers has been employed by Amtrak since January 1, 1983 as a Passenger Engineer. Amtrak is a corporation created by the Rail Passenger Service Act of 1970, 45 U.S.C. § 541 *et seq.*, for the purpose of providing intercity rail passenger service within the United States. Pursuant to 45 U.S.C. § 546(b), Amtrak is subject to federal labor statutes covering railroads and is a "carrier" as defined in Section 1, First of the RLA (45 U.S.C. § 151 First).

BLE is an unincorporated association and a labor organization national in scope, organized in accordance with

the Railway Labor Act, and admits to membership railroad employees in the crafts or classes of locomotive engineers and firemen. The BLE is a "representative" of employees within the meaning of Section 1 of the Railway Labor Act (45 U.S.C. § 151). The BLE is qualified to and has appointed two labor members of the First Division at the National Railroad Adjustment Board under Section 3 First(h) of the RLA, 45 U.S.C. § 153 First(h). The BLE is the bargaining representative for the craft or class of passenger engineers employed by Amtrak, and effective January 1, 1983, has been a party to the written collective bargaining agreement with Amtrak for that craft or class. The BLE's agreement with Amtrak provides for rates of pay, hours of work, health and welfare benefits, seniority rights, and other terms and conditions of employment for the craft or class of passenger engineers.

Among other things, the collective bargaining agreement entered into by BLE and Amtrak contains discipline and investigation rules, and machinery for resolution of disputes involving the interpretation and application of the provisions of the agreement covering the craft or class of passenger engineers. Rule 1c. defines the "duly accredited representative" as "the General Chairman of the Brotherhood of Locomotive Engineers having jurisdiction or any elected officer of the Brotherhood of Locomotive Engineers designated by the General Chairman." (Jt. App. at 30). Rules 20 and 21 of the BLE agreement (Jt. App. at 31-43) provide that a claim by a passenger engineer for compensation "may be made only by a claimant or, on his behalf, by a duly accredited representative"; that the passenger engineer and "his duly accredited representative will have the right to be present during" disciplinary in-

vestigations; that the engineer or his duly accredited representative may process appeals of any claim, grievance, or disciplinary action; and that the General Chairman may process appeals at the final stage of handling with the highest officer of Amtrak designated to handle appeals. If unsuccessful at the company level, the passenger engineer may progress his claim to binding arbitration before the First Division of the National Railroad Adjustment Board, where he "may be heard in person, by counsel, or by other representatives," as he may elect, in accordance with Section 3, First (j) of the Railway Labor Act (45 U.S.C. § 153, First(j)).

The UTU is an unincorporated association and a labor organization national in scope, organized in accordance with the Railway Labor Act and admits to membership railroad employees in the crafts or classes of locomotive engineers, firemen, conductors, trainmen and yardmen. The UTU is qualified to and has appointed two labor members of the First Division of the National Railroad Adjustment Board under Section 3 First(h) of the RLA (45 U.S.C. § 153 First(h)).

The UTU is the bargaining representative for the crafts of passenger conductors and assistant conductors employed by Amtrak. Since January 1, 1983, the UTU has been a party to written collective bargaining agreements with Amtrak for these crafts. The collective bargaining agreement entered into between Amtrak and UTU for the crafts or classes of passenger conductors and assistant passenger conductors contains provisions for claims and grievance handling and representation at investigations. Similar to the provisions of the BLE-Amtrak agreement, these provisions define "duly accredited representative" to be the local chairman of the respective local unit of UTU "or a member of the UTU designated by the General Chairman," (Jt. App. at 48) and designate the "duly accredited representative" to appear at investigations of conductors and assistant conductors and to process any claims, grievances or appeals for that craft or class of employees. (Jt. App. at 49-61).[1] Both the BLE and UTU agreements with Amtrak contain union shop provisions covered by Section 2 Eleventh(c) of the Railway Labor Act (45 U.S.C. § 152 Eleventh(c)). (Jt. App. at 43-46; 61-67).

No passenger engineer at Amtrak performs any services in or is temporarily transferred to any craft or class of service at Amtrak as to which the BLE is not the duly designated and authorized representative for purposes of the collective bargaining agreement or the Railway Labor Act. No Amtrak passenger engineer holds employment rights in any craft or class at Amtrak other than passenger engineer. No employee in any craft represented by the UTU on Amtrak holds seniority or employment rights in the craft of passenger engineers.

Prior to January 1, 1983, Amtrak's trains on the Northeast Corridor were operated by Conrail engineers pursuant to contractual arrangements between Amtrak and Conrail. Those engineers were employees of Conrail represented for purposes of collective bargaining by the BLE. After January 1, 1983, Amtrak began directly employing

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[1] UTU recognizes that a favorable decision for Landers here also voids the exclusive representation clause in the UTU-Amtrak agreement.

passenger engineers on the Northeast Corridor, including Landers.

On approximately February 17, 1984, Landers was charged with misconduct while performing his assignment as a passenger engineer. An investigatory hearing into these charges was conducted by Amtrak on February 28, 1984. At that hearing, Landers appeared and represented himself. He had previously requested to be represented by UTU, but was advised by Amtrak that under the terms of the collective bargaining agreement with BLE he could only be represented by a "duly accredited representative" of his craft, i.e., a BLE representative.

On March 6, 1984, Amtrak concluded that the disciplinary charges against Landers had been proven and assessed Landers 30 days' actual suspension. Landers did not appeal his suspension to the National Railroad Adjustment Board. Landers' suspension has been served and he has returned to work as a passenger engineer.

SUMMARY OF ARGUMENT

The absolute right of railroad operating employees to belong to the union of their choice (at this point in history, UTU or BLE) in satisfying a union shop obligation in a collective bargaining agreement is firmly rooted in the plain meaning of Section 2 Eleventh(c) of the Railway Labor Act (45 U.S.C. § 152 Eleventh (c)). *Birkholz v. Dirks*, 391 F.2d 289 (7th Cir. 1968); *O'Connell v. Erie Lackawanna R.R.*, 391 F.2d 156 (2d Cir. 1968). The legislative history confirms the plain meaning of the statute since it clearly demonstrates that the four brotherhoods now comprising UTU (Brotherhood of Railroad Trainmen ("BRT"), Brotherhood of Locomotive Firemen and Enginemen ("BLF&E"), Order of Railway Conductors and Brakemen ("ORC&B") and Switchmen's Union of North America ("SUNA")) agreed on the final version, requiring a substantial compromise of their competing interests, well understood by the Congress (96 Cong. Rec. 17059 cols. 2-3) (January 1, 1951). Only BLE opposed passage in its current form (96 Cong. Rec. 17052, col. 2) (January 1, 1951). Even the Court of Appeals below is convinced of this view. (*Landers v. Nat'l R.R. Passenger Corp.*, 814 F.2d 41, 47 (1st Cir. 1987); Pet. App. at 13a).

However, by allowing exclusive representation provisions in the BLE-Amtrak collective bargaining agreement for engineers to deprive Landers of the assistance of his union, UTU, at one of the most critical moments in employment, a disciplinary investigation on the property of the carrier, the Court of Appeals reduces this statutorily protected right to an absurdity. As the Fifth Circuit recently noted in *Taylor v. Missouri Pacific R.R.*, 794 F.2d 1082 (5th Cir.), *cert. denied sub nom. United Transportation Union v. Taylor*, — U.S. —, 93 L.Ed. 2d 721 (1986), to permit the exercise of the membership of choice, without permitting the chosen union to represent on the property, reduces the right to that of membership in a social club. *Id.* at 1086. Such a result was surely not intended by the Congress.

It is no answer to say as did the Court of Appeals below that it is sufficient if the minority union can represent the employee at arbitration, as is permitted to *any*

representative chosen by the employee at that stage pursuant to the plain meaning of Section 3 First(j) of the Act (45 U.S.C. § 153 First (j)). Not only does that fail to recognize the special status of UTU and BLE evident in the union shop provisions of the Act, but it additionally places the union of membership at a distinct disadvantage in fulfilling its duty of fair representation (*Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944)) because the record before the arbitration panel is fixed by what the handling has been on the property. *Cf., Union Pacific R.R. v. Sheehan*, 439 U.S. 89 (1978) (failure to preserve time limits on the property in filing claim upheld in arbitration not reviewable under Section 3 First(q) of RLA (45 U.S.C. § 153 First(q)) even if characterized as error of law).

Indeed, *Taylor v. Missouri Pacific R.R., supra*, was not the first case to explicitly uphold the right of railroad operating employees to have the assistance of their union on the property. The Seventh Circuit in *McElroy v. Terminal R.R. Ass'n of St. Louis*, 392 F.2d 966, 969 (7th Cir. 1968), *cert. denied*, 393 U.S. 813 (1969), stated the RLA "guarantees an individual employee the right to prosecute his grievance through any representative he may designate." The attempts of the Court of Appeals below to distinguish *McElroy* do not bear analysis because the facts do not decide this issue, the plain meaning of Section 2 Eleventh(c) (45 U.S.C. § 152 Eleventh(c)) does.

Nor is the First Circuit justified in relying on decisional law whose facts antedate the passage of Section 2 Eleventh, and which did not involve operating crafts. The Court of Appeals' attempts to rely on this hoary and inapposite precedent is just as unjustified as its strained

reading of this Court's decision in *Pennsylvania R.R. v. Rychlik*, 352 U.S. 480 (1957). In that case, this Court decided the issue before it, *viz.*, whether membership in a non-traditional operating union (UROC) which had *no* members on the National Railroad Adjustment Board, as required by Section 2 Eleventh(c), could satisfy the union shop obligation. A resolution of that issue does not even identify the issue in the case at bar.

The decision of this Court in *Felter v. Southern Pacific Corp.*, 359 U.S. 326 (1959), on the other hand, does demonstrate that the plain meaning of Section 2 Eleventh will govern over the parties' arrangements on the property. There this Court invalidated an agreement provision, requiring dues check-off revocation on the union's form only, as contrary to the plain meaning of Section 2 Eleventh(b), which contains no such qualification. The attempt of BLE and Amtrak to qualify an engineer's choice of membership by making it meaningless should meet a similar fate.

Resolution of this issue favorably to Landers implicates no rights beyond those of railroad operating employees to choose between UTU and BLE to satisfy a union shop obligation either of them negotiates with a carrier. The language used in Section 2 Eleventh(c) assures that result. Non-operating crafts on the railroads and the rest of American labor are unaffected by this result because Section 2 Eleventh(c) on its face does not apply to them. *See, Pennsylvania R.R. v. Rychlik, supra*, 352 U.S. at 493-94.

The full force of exclusivity of representation evident in National Labor Relations Act cases, such as *Republic*

Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965), does not apply to UTU and BLE. In that regard, the language of Section 2 Eleventh(c) must be given effect, although all other attributes of exclusive representation apply. That this is true is demonstrated by those cases permitting the minority union as between UTU and BLE to set up Public Law Boards pursuant to Section 3 Second of the RLA (45 U.S.C. § 153 Second) to resolve disputes and grievances, but nonetheless reserving the right to interpret and apply agreement provisions to the contract holder. *See, General Committee of Adjustment v. Burlington Northern, Inc.*, 563 F.2d 1279 (8th Cir. 1977); *Bro. of Locomotive Engineers v. Denver & R.G.W.R.R.*, 411 F.2d 1115 (10th Cir. 1969).

Reversal of the decision below gives effect to the plain meaning of the membership choice available to all railroad operating employees. The union of choice as between UTU and BLE must be given the opportunity to represent its member if requested to do so on the property if Section 2 Eleventh(c) is to be given its plain meaning. The ability of the contract holder is not unduly impaired, since it remains the exclusive agent for negotiation, interpretation and application of the agreement.

———o———

ARGUMENT

I. UNDER SECTION 2 ELEVENTH(c) OF THE RAILWAY LABOR ACT (45 U.S.C. 152 Eleventh (c)), WHERE THERE IS A UNION SHOP, A RAILROAD OPERATING EMPLOYEE MAY BELONG TO UTU OR BLE, NO MATTER WHICH ORGANIZATION HOLDS THE CONTRACT.

Prior to 1951 union shop provisions in railroad labor agreements were prohibited, largely as a result of the concern at the time of the passage of the 1934 amendments to the Railway Labor Act (45 U.S.C. § 151 *et seq.*) that company unions would choke off independent representation. *See*, S.Rep. No. 2262, 81st Cong. 2d Sess. pp. 2-3 (1950). When it became apparent that company unions were no longer the problem once thought, railroad unions sought and Congress passed Section 2 Eleventh of the Act. *Id.* It stated, in pertinent part:

> Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this act shall be permitted—
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days, following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: * * *
>
> * * *
>
> (c) The requirement of membership in a labor organization in an agreement made pursuant to sub-

paragraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of Subsection (h) of Section 153 of this chapter, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter, and admitting to membership employees of a craft or class in any of said services; * * * Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employees, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him. Provided, further, that nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

The language used in the statute makes it clear that the only time a union representing engineers can require an employee to join that union, as opposed to joining the other union national in scope representing operating employees, is when that employee is not a member of either union. On the effective date of the agreement, such an employee may be required to join the contracting union. This is explicitly provided by the penultimate proviso in Section 2 Eleventh(c). And even such an employee, as well

as any other employee, may thereafter change his membership to the other union national in scope, appointing members to the First Division of the National Railroad Adjustment Board, and admitting to membership operating employees. This is expressly provided in the last proviso to Section 2, Eleventh(e). This Court in *Felter v. Southern Pacific Co.*, 359 U.S. 326, 336-337 (1959) relied upon this proviso as establishing "the area that the Act leaves open for solicitation by rival organizations" and provides "the area where even a worker under a union-shop arrangement can change affiliations, see *Pennsylvania R. Co. v. Rychlik*, 352 U.S. 480, 492-494."

In *Felter*, this Court held (359 U.S. at 337) the Congressional policy permitted "Organizational efforts * * * attended by persuading the recruit to drop his membership in his present union and terminate any check-off of his wage in its favor." This Court therefore held illegal and violative of the Railway Labor Act a contractual arrangement between the Trainmen's Union and the Southern Pacific which require the use of a prescribed form supplied to all employees if an employee wished to revoke his check-off permitted by Section 2 Eleventh(b), stating (359 U.S. at 337-338): "There may well be a difference in the weight of persuasion necessary to enlist the worker if he cannot at once effectuate his intentions through papers furnished him on the spot by the recruiting organization. We do not say whether the 'cooling off' period which the procedure insisted upon here creates would be wise or unwise as a matter of policy. It is enough to say that we believe the Act has not left any place for it."

In this regard, it is submitted all this Court did in *Felter v. Southern Pacific Corp., supra*, was apply the

plain meaning of the subsection of Section 2 Eleventh of the RLA (45 U.S.C. 152 Eleventh(b)) involved therein. This Court has consistently avoided judicial legislation in applying the plain meaning of statutes passed by the Congress and signed by the President. *See, e.g., U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980) (absent Constitutional infirmity the words of a statute mark the beginning and the end of judicial inquiry); *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). That is all Landers seeks here.

The legislative history and depth of the involvement of operating organizations in the final bill confirm the literal reading of the statute. Congressman Harris served as a spokesman for the House Committee on Interstate and Foreign Commerce, in guiding this legislation through the House. On January 1, 1951, immediately preceding the adoption on that same day by the House of the Senate Bill, as amended by the Senate, Congressman Harris explained the history and purpose of Section 2 Eleventh(c) to Congress as follows (96 Cong. Rec. 17059, cols. 2-3):

> "The similar House bill, H. R. 7789, was a subject of lengthy hearings by our committee during May and June of 1950. During the course of the hearings differences of opinion developed * * * among labor organizations themselves, particularly those in operating services over the possible requirement that certain employees be required to maintain membership in more than one union.
>
> "We in the committee attempted to determine and resolve these differences * * *
>
> "It was not entirely satisfactory, therefore, subsequently certain further questions arose over the definiteness of the protection afforded operating em-

> ployees against being compelled to belong to more than one union * * *
>
> "As the bill was reported * * * the operating brotherhoods opposed it. On September 11, 1950, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, and the Brotherhood of Railroad Trainmen, directed a letter to Senator Lucas opposing the bill S. 3295, before the Senate in its present form.
>
> "The following day, September 12, 1950, a letter directed to the members of the Rules Committee of the House signed by representatives of all four of the operating brotherhoods, the Locomotive Engineers, the Firemen and Enginemen, the Brotherhood of Railway Conductors, and the Brotherhood of Railroad Trainmen, opposing H. R. 7789, which had been reported by our committee and stating that the proposed amendments in their opinion 'make the bill more unsatisfactory'. They, therefore, requested the Rules Committee to decline a rule on the proposal.
>
> "In December, these *** differences *** were matters of amendment on the Senate floor during the consideration of the bill by that body. Clarification of the amendments was made. There were adjustments and the bill in the amended form as it comes to us now from the Senate appears to be endorsed and actually urged by 21 of the 22 national railroad labor organizations.
>
> "On December 11, three of the four operating brotherhoods, the Firemen and Engineers, Order of Railway Conductors and the Trainmen, wrote a letter to the chairman of the House committee, to the effect that they had been opposed to railway union shop bills, S. 3295 and H. R. 7739, but the Senate had just passed S. 3295, and incorporated therein a measure which makes the proposal entirely satisfactory. Having cleared up these *** issues, they urged that the Senate bill, 3295, which we have before us today, be passed."

Congressman Harris explained Section 2 Eleventh(c) as follows (96 Cong. Rec. 17059, col. 3):

> "I have stated the purposes of this proposed amendment. Now the two principal changes in this Senate-passed bill from the House bill as reported by the committee are:
>
> "• • • the addition of *subparagraph* (*c*) which *leaves the individual employee in the operating services the choice of operating union to which he will belong*, and this specifically resolves any doubt concerning a possible requirement of dual membership. However, if any employee is not a member of any union at the time of union shop agreement, if any, he must join the craft of the bargaining agent, within the 60 days in which he is working at the time." (Emphasis supplied).

Given the clarity of the statute on the membership choice available in union shop agreements as to operating employees, it is hardly surprising that the membership issue was resolved on that basis by the Seventh Circuit in *Birkholz v. Dirks*, 391 F.2d 289 (7th Cir. 1968) and the Second Circuit in *O'Connell v. Erie Lackawanna R.R.*, 391 F.2d 156 (2d Cir. 1968). Prior to discussing those cases, it should be noted that certiorari was granted in both cases, but after consolidation, briefing and argument, the judgments were vacated and the cases remanded to the respective district courts to dismiss the cases as moot *sub nom. Brotherhood of Railroad Trainmen v. O'Connell*, 395 U.S. 210 (1969) because of the then completed merger of all operating unions except BLE (BRT, BLF&E, ORC&B and SUNA) into the UTU.

In *O'Connell v. Erie Lackawanna*, *supra*, appeal was taken from a district court order voiding a union shop collective bargaining agreement provision between the carrier and BRT mandating membership in that organization without regard to the choice of membership contained in Section 2 Eleventh(c) of the RLA. 391 F.2d at 157. In beginning the opinion's discussion of the applicable law, Chief Judge Lumbard noted that "[a]ppellants concede that if the words of Section 2, Eleventh of the Railway Labor Act are given their natural meaning, the agreement is invalid. . . ." *Id.* (footnote omitted). He then agreed with the district court " . . . that there is no compelling indication of legislative intent contrary to the clear words of the statute. . . ." *Id.*

After fully discussing the legislative history referred to hereinabove, including citation to a statement of Congressman O'Hara agreeing with a statement made at the time by BLE that the amendment would mean an engineer would never have to join BLE (96 Cong. Rec. 17052 (1951)) (*id.* at 161) the Court turned to the argument that this Court's decision in *Pennsylvania R.R. v. Rychlik*, 352 U.S. 480 (1957) nonetheless disposed of the argument favorably to BRT. Judge Lumbard noted that this Court's opinion indicated its understanding of the plain meaning of the provisions of Section 2 Eleventh(c) of the RLA, quoting from 352 U.S. at 485 (*id.*), and further noting that *Pennsylvania R.R. v. Rychlik, supra*, was concerned solely with the issue of the scope of 2 Eleventh(c) as applied to unions qualified under Section 3 First(h) of the Act, and that the decision involved only a question of whether membership in a union which was not so qualified, could satisfy the union shop provisions of the Act. *Id.*

The opinion then noted this Court's statement in *Rychlik* that the sole aim of the provision was to protect operat-

ing employees from the requirement of dual unionism in an industry with high job mobility (*id.*, quoting from 77 S.Ct. 426), and this Court's statement in *Rychlik* (at 77 S.Ct. 427-28) that the only purpose of Section 2 Eleventh(c) was a very narrow one: to prevent compulsory dual unionism when an employee temporarily changed crafts. The Court rejected the appellants' argument that that language from this Court's decision in *Rychlik* required that there actually be a possibility on a given property that shuttling back and forth between or among unions could occur before the permissive membership provisions of Section 2 Eleventh(c) were applicable, specifically finding that this Court in *Rychlik* did not reach the questions decided by the Second Circuit in that case (352 U.S. at 485). *Id.* at 162.

Finally, Judge Lumbard noted the existence of the unpersuasive contrary holding of the Third Circuit in *Rohrer v. Conemaugh and Black Lick R.R.*, 359 F.2d 127 (3rd Cir. 1966), the similar holding of the Seventh Circuit in *Birkholz v. Dirks*, 391 F.2d 289 (7th Cir. 1968), the clear implication of this Court's decision in *Felter v. Southern Pacific Co.*, 359 U.S. 326 (1959) that an operating employee can satisfy union shop requirement by membership in any of the recognized railroad unions for the First Division, in holding that there is no justification for the contention that a union is entitled to a strict union shop despite the language of Section 2 Eleventh(c) of the Act simply because it is the sole collective bargaining agent for all employees on a given carrier. *Id.* at 162-63.

The Seventh Circuit in *Birkholz v. Dirks*, *supra*, found likewise with respect to the right to membership in any of the operating organizations with membership on the

First Division of the National Railroad Adjustment Board under Section 3 First(h) of the Act, also rejecting the narrow reading of this Court's decision in *Rychlik* and reliance upon the contrary decision in *Rohrer* in the Third Circuit, finding that the literal reading of Section 2 Eleventh(c) expresses the intention of Congress as demonstrated by the legislative history of the Act. 391 F.2d at 290-91. The court in *Birkholz* found as did the Second Circuit in *O'Connell* that this Court's decision in *Rychlik* merely held that only unions already qualified as electors for the Labor Members of the National Railroad Adjustment Board under Section 3 First(h) are available for alternate membership under the union shop agreement. *Id.* at 293-94. Finally, the *Birkholz* court distinguished the *Rohrer* decision from the Third Circuit on the basis that it involved a rail property where a union other than one of those appointing members of the First Division of the National Railroad Adjustment Board represented all employees (United Steelworkers of America).

The law on the topic of the availability of alternate union membership under Section 2 Eleventh(c) of the Railway Labor Act is so clear in its present state that even the First Circuit in the decision below had to concede that alternate membership in accordance with the plain meaning of Section 2 Eleventh(c) is obviously available to operating employees with respect to UTU and BLE. (814 F.2d at 47; Pet. App. at 13a).

II. THE STATUTORILY PROTECTED RIGHT OF A RAILROAD OPERATING EMPLOYEE TO MEMBERSHIP IN THE UNION OF CHOICE MAY NOT BE RENDERED INEFFECTIVE BY A LABOR AGREEMENT WHICH DEPRIVES HIM OF THE ASSISTANCE OF HIS UNION IN CARRIER LEVEL DISCIPLINARY PROCEEDINGS.

Even though the First Circuit recognized below that alternate membership in UTU is available even if BLE holds the contract on a given carrier as provided for in the clear words used by the Congress in Section 2 (Eleventh(c) of the Railway Labor Act (814 F.2d at 47; Pet. App. at 13a), it nonetheless would permit a contrary practical result by permitting indirect accomplishment of what cannot be accomplished directly. If alternate membership is reduced to an absurdity by permitting the existence of an exclusive representation clause in a collective bargaining agreement prohibiting participation by the union of membership in on the property disciplinary investigations or grievance handling, then there is no effect given to the plain meaning of the statute. The Fifth Circuit in *Taylor v. Missouri Pacific R.R.*, 794 F.2d 1082 (5th Cir.), *cert. denied sub nom. United Transportation Union v. Taylor*, — U.S. —, 93 L.Ed. 2d 721 (1986) noted that to permit the exercise of membership of choice under Section 2 Eleventh (c) of the RLA, without permitting the chosen union to represent an individual in a disciplinary proceeding on the property, reduces the right to that of membership in a social club. *Id.* at 1086.[2] The plain meaning of the statute and the legislative history simply do not contemplate such a result.

[2] The shoe was on the other foot in *Taylor* in that a BLE member was challenging an exclusive representation provision in a UTU-carrier agreement.

The practical implications of such a position are more than intuitively obvious. And it is woefully insufficient for the First Circuit in the decision below to gloss over the clear violation to the plain meaning of Section 2 Eleventh(c) of the RLA merely by recognizing the effect of the Section 3 First(j) (45 U.S.C. § 153 First(j)) command that at the arbitration stage an employee may be represented by *any* representative chosen by the employee. It is submitted that the union of membership, no less than the contract holder, owes its members the duty of fair representation this Court has held is implied in the Railway Labor Act. *See, Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944). Representation is at the core of membership. The purpose of Section 2 Eleventh, to eliminate the problem of "free riders" with regard to representation (*Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961)) is served with respect to operating employees by permitting the full exercise of rights under 2 Eleventh(c) to alternate membership, including the right to representation.

After all, as is apparent to those familiar with the workings of arbitration on the railroads under Section 3 of the RLA, rights can be fixed by the handling which occurs on the property. In that regard, this Court's decision in *Union Pacific R.R. v. Sheehan*, 439 U.S. 89 (1978) is instructive. In that case, an employee with a claim arising out of an employment relationship with the carrier had sued the carrier in court with respect to such violation, as was permitted at the time of the suit by this Court's

decision in *Moore v. Illinois Central R.R.*, 312 U.S. 630 (1941). After this Court's decision in *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972) overruling *Moore*, the court action was dismissed and the employee filed a claim on the property with his carrier. The carrier asserted failure to comply with the time limits contained in the collective bargaining agreement on the property, which was sustained in arbitration. This Court held, consistent with the plain meaning of Section 3 First(q) of the Act (45 U.S.C. § 153 First(q)) and overwhelming past precedent from this Court, that the arbitration award would not be overturned, as the Fifth Circuit had done characterizing the error as one of law. Thus, it is clear that a failure by the contract holder to abide by time limits under the agreement would gut the employee's claim even if the union of membership represented the employee at arbitration. While the employee might have an action for breach of the duty of fair representation against the contract holder, *if* the employee could establish that the contract holder acted in bad faith, arbitrarily, or perfunctorily (*Vaca v. Sipes*, 386 U.S. 171 (1967)), that would be of small comfort to him. The right to alternative membership in 2 Eleventh(c) of the RLA must carry with it the right to representation on the property of the carrier if it is to be accorded the effect intended by the Congress, particularly given the legislative history surrounding its passage.

The Fifth Circuit's decision in *Taylor v. Missouri Pacific R.R., supra*, merely applied the logic of the previous decision of the Seventh Circuit in *McElroy v. Terminal R.R. Association of St. Louis*, 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 813 (1969). In that case,

members of the BLF&E who were employees of the switching terminal and who held seniority both as firemen and as engineers challenged the validity of a collective bargaining agreement between the carrier and the BLE that had an exclusive representation provision for BLE on the property with respect to any grievances or discipline. The Seventh Circuit held that the provision violated the Railway Labor Act. The court noted that the case presented for decision a question left open in *General Committee of Adjustment v. Southern Pacific Co.*, 320 U.S. 338 (1943), namely, whether an employee's assertion of the privilege of choosing his own representative for the prosecution of his grievances and claims under the Railway Labor Act was justiciable. 392 F.2d at 968. It noted that the decision by the Ninth Circuit in the *General Committee of Adjustment v. Southern Pacific Co.*, case itself and *Estes v. Union Terminal Co.*, 89 F.2d 768, 770 (5th Cir. 1937), as well as 40 Op.A.G. 494 (1946), had held that such a privilege existed. *Id.*

The *McElroy* court then stated the issue that is really at the core of this case:

> . . . [I]f the Railway Labor Act accords these plaintiffs the right to designate the Firemen's union as their representative for settling grievances, the District Court did have jurisdiction to award appropriate relief unless jurisdiction over this dispute has been granted exclusively to the National Railroad Adjustment Board. *Id.*

That statement of the issue makes clear that the criticism of the legislative history relied upon by Landers, made by the First Circuit below, (814 F.2d at 43; Pet. App. at 4a-5a), while correct to the extent that the proposals being

discussed were not passed in 1934, is incorrect if, as Landers asserts here, Section 2 Eleventh(c) passed January 1, 1951, accorded him the right as an operating employee belonging to a union having members on the First Division in the National Railroad Adjustment Board pursuant to Section 3 First(h) of the RLA to have that union represent him at his request in an on the property disciplinary investigation without regard to the fact that a union shop agreement existed with the other national operating union.

In searching the Railway Labor Act for rights to designate representatives in settling grievances, the *McElroy* court first noted that as to the making and maintaining of collective bargaining agreements, the union holding the contract retained the exclusive right to represent, and any right to designate the representative other than the contract holder must apply only to "minor disputes," citing *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 33 (1957). *Id.* The Court then turned to the statement in Section 2 Second of the RLA (45 U.S.C. § 152 Second) that all disputes shall be considered "in conference between representatives designated and authorized so to confer, respectively by the carrier or carriers and by the employees thereof interested in the dispute." *Id.* at 969. The Court next reviewed the legislative history rejected by the First Circuit below, finding it supportive of the view that railroad employees have a right to be represented by minority unions in grievance matters. *Id.* After considering the Section 2 Fourth (45 U.S.C. § 152 Fourth) permission to individual employees or local representatives to confer with management during working hours and the Section 2 Sixth provision (45 U.S.C. § 152 Sixth) that designated representatives of the

employees and carriers have a duty to specify time and place for conference, the Court noted that in Section 3 First(j) (45 U.S.C. § 153 First(j)) of the Act, Congress concededly granted employees the right to choose any representative to act on their behalf in handling minor disputes before the National Railroad Adjustment Board. *Id.*

The *McElroy* court, unlike the court below, found support in Section 3 First(i) of the RLA that minor disputes "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes." *Id.* Admittedly the facts are different on Amtrak because it has no firemen, but the *McElroy* court's reliance on 3 First(i) was not exclusive, merely supportive. The Seventh Circuit then turned to this Court's decision in *Elgin, Joliet & E.Ry. v. Burley*, 325 U.S. 711 (1945), *aff'd on rehearing*, 327 U.S. 661 (1946), wherein it was held that an individual employee's rights cannot be nullified by an agreement between carrier and union since they are statutory rights which may be exercised independently. *Id.*

But it is clear, however, that the key to the *McElroy* court's decision and its view that *Broady v. Illinois Central R.R.*, 191 F.2d 73 (7th Cir. 1951), *cert. denied*, 342 U.S. 897 (1951) and *Butler v. Thompson* 192 F.2d 831 (8th Cir. 1951) were inapposite, was that those cases did not involve Section 2 Eleventh(c) of the Railway Labor Act, citing *Pennsylvania R.R. v. Rychlik, supra*, and *Birkholz v. Dirks, supra.* The *McElroy* court also rejected *Edwards v. St. Louis-San Francisco R.R.*, 361 F.2d 946 (7th Cir. 1966) as not involving representation by union

of choice in operating crafts, noting that the principal question involved there was an interpretation of an agreement provision (concerning the obligation of a carrier to produce missing witnesses at disciplinary hearings), a question it found committed exclusively to arbitration under the Act. *Id.* at 971. In the decision's conclusion it is clear again that the *McElroy* result was dictated by the presence of Section 2 Eleventh(c) in the RLA. For the *McElroy* court held very similarly to the holding in *Taylor v. Missouri Pacific R.R., supra*:

> [I]f appellees were to prevail, Section 2 Eleventh(c) would be rendered a nullity as to these plaintiffs. The "membership" conferred by that section would, for them, be a naked legal right unaccompanied by any of the ordinary material benefits of belonging to a union. *Id.* at 972.

The *McElroy* Court's reading of this Court's decision in *Pennsylvania R.R. v. Rychlik, supra,* which was identical to that of the courts in *Birkholz v. Dirks, supra,* and *O'Connell v. Erie Lackawanna R.R., supra,* is certainly correct. *Rychlik* only decided that membership in a union which did not have a member on the First Division of the National Railroad Adjustment Board could not satisfy a union shop provision because it did not meet that requirement contained in the statute. This Court made it clear it was deciding only that issue, which left the Second Circuit's resolution of the membership issue present there intact, particularly for unions which met that requirement. Moreover, there are indications in the *Rychlik* decision itself tending to indicate that shuttling between crafts need not be present in order for Section 2 Eleventh (c) to operate. In the discussion of shuttling between

crafts in *Rychlik,* it is clear this Court's reference was to the existence of those facts in the legislative history. That is to say, the establishment of the legislative facts was necessary in the Congress. Those facts need not be established here in order to apply a statute plain on its face. Put simply, Section 2 Eleventh(c) does not require that shuttling between crafts be present in order for its provisions to operate. Such a requirement would represent judicial legislation.

Just as *Felter v. Southern Pacific Co., supra,* aided the lower courts in the membership cases, so too it is instructive here. Again, *Felter* quite clearly stands for the proposition that the plain meaning of 2 Eleventh(c)'s provisions are to be given effect. The agreement provision in *Felter* was voided because it required use of the union's form in order to revoke the dues check off permitted by 2 Eleventh(b) where the statute contained no such limitation as to revocation. Similarly, Section 2 Eleventh(c) contains absolutely no limitation on membership in the minority qualified operating union. To permit an exclusive representation clause in an agreement to render the permissive membership available in 2 Eleventh(c) useless would be to permit an agreement to qualify a clearly granted statutory right. The agreement here should thus be voided just as was the agreement in *Felter.*

It is recognized, particularly because of the presence of the *amici* in this case, that there is some concern that what is decided here could affect the exclusivity of representation under the National Labor Relations Act and nonoperating craft unions under the Railway Labor Act. However, it is clear that Section 2 Eleventh(c) by its very lan-

guage limits the application of principle argued by Landers here to membership in UTU or BLE. Indeed, this Court in *Pennsylvania R.R. v. Rychlik, supra,* clearly indicated that in stating "[t]he National Labor Relations Act contains no parallel to subsection (c), and employees under a union shop contract governed by that Act must join and maintain membership in the union designated as the bargaining representative or suffer discharge. Similarly, subsection (c) does not apply to *non-operating* employees, where the problem of seasonal intercraft movement does not exist. Railroad employees such as clerks working under a union-shop contract have no right at all to join a union other than the bargaining representative. . . ." 352 U.S. at 493-94 (footnote omitted; emphasis in original).

Moreover, the exclusivity of representation of BLE in all respects other than grievance and discipline matters remains intact. But the full force of exclusivity of representation under the NLRA as stated by this Court in decisions such as *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 653 (1965), does not apply to UTU and BLE. In that regard, the language of Section 2 Eleventh(c) must be given effect, but all other attributes of exclusive representation do indeed apply. That this is true is demonstrated by those cases permitting the minority union as between UTU and BLE to set up public law boards pursuant to Section 3 Second of the RLA (45 U.S.C. § 153 Second) to resolve disputes and grievances, but nonetheless reserving the right to interpret and apply agreement provisions to the contract holder. *See, General Committee of Adjustment v. Burlington Northern, Inc.*, 563 F.2d

1279 (8th Cir. 1977); *Bro. of Locomotive Engineers v. Denver & R.G.W. R.R.*, 411 F.2d 1115 (10th Cir. 1969).

Reversal of the decision below gives effect to the plain meaning of the membership choice available to all railroad operating employees. The union of choice as between UTU and BLE must be given the opportunity to represent its member if requested to do so on the property of Amtrak if Section 2 Eleventh(c) is to be given its plain meaning. The ability of the contract holder is not unduly impaired, since it remains the exclusive agent for negotiation, interpretation and application of the agreement. Finally, the perils of judicial legislation are avoided by ensuring that a statutory right is not stripped of all meaning to further the policy of exclusive representation clearly applicable to all unions, except UTU and BLE in the circumstances specified by Section 2 Eleventh(c) of the RLA (45 U.S.C. § 152 Eleventh(c)). *Cf., U.S. Railroad Retirement Board v. Fritz, supra; Reiter v. Sonotone Corp., supra.*

———o———

CONCLUSION

For the foregoing reasons, this Court should reverse the March 24, 1987, judgment of the United States Court of Appeals for the First Circuit, which affirmed the judgment dated June 24, 1986 (filed June 27, 1986) of the United States District Court for the District of Massachusetts.

Respectfully submitted,

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RESPONDENT'S

BRIEF

(8)

No. 86-2037

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

PAUL G. LANDERS,
Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENT NATIONAL RAILROAD PASSENGER CORPORATION

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QUESTION PRESENTED

May a railroad and a union representing a craft of its employees enter into a collective bargaining agreement providing that only the bargaining representative may participate on behalf of those employees in company-level disciplinary and grievance proceedings.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-2037

PAUL G. LANDERS,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENT NATIONAL RAILROAD PASSENGER CORPORATION

STATEMENT OF THE CASE

On February 21, 1984, Petitioner Paul G. Landers ("Landers"), a passenger engineer employed by the National Railroad Passenger Corporation ("Amtrak"), filed this action in the United States District Court for the District of Massachusetts against Amtrak and the Brotherhood of Locomotive Engineers ("BLE"), the labor union which represents the craft of passenger engineers at Amtrak.[1] Although Landers works as a passenger engineer, he holds union membership in the United Transportation Union ("UTU"), which represents certain other crafts of Amtrak employees.

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[1] The Complaint is reproduced in the Joint Appendix ("Jt. App.") at 3-8.

His suit arose out of disciplinary action taken against him for violation of company work rules. At the internal disciplinary hearing convened pursuant to the BLE/Amtrak collective bargaining agreement, which applies to all passenger engineers regardless of union membership, he was not permitted to be represented by the UTU. At Amtrak, the collective bargaining agreements, including the BLE and UTU agreements, restrict representation at such hearings to duly accredited representatives of the craft, in this case the BLE. Landers' Complaint alleged that Amtrak and the BLE violated his rights under Sections 2 and 3 of the Railway Labor Act ("RLA"), 45 U.S.C. § 152 and 153, by refusing to allow him to select the UTU to represent him at his disciplinary hearing.

In October, 1985, both BLE and Amtrak filed motions seeking to dismiss the Complaint. The parties also filed a Statement of Undisputed Facts (Jt. App. at 68-73). All factual statements contained in this memorandum are premised on facts contained in that Statement.

Judge Robert E. Keeton conducted a civil non-jury trial on November 19, 1985 and April 2, 1986, and accepted additional affidavits filed by the parties in November and December, 1985. (Jt. App. at 74-92). On June 24, 1986, Judge Keeton issued a memorandum opinion dismissing Landers' Complaint. After determining that the court had subject matter jurisdiction over the action, Judge Keeton ruled that Landers had failed to establish any statutory or factual grounds for his asserted right to have the UTU represent him at company-level proceedings. In fact, Judge Keeton concluded that a careful reading of the statute revealed that Congress did not intend to establish such a right. Accordingly, the court ruled that the Railway Labor Act permitted Amtrak and the BLE to restrict representation at company disciplinary proceedings to the BLE. The unreported decision of the district court is reproduced in the Appendix to the UTU's Petition for Certiorari ("Pet. App.") at 19a-34a.

On March 24, 1987, the Court of Appeals for the First Circuit affirmed the lower court's judgment. *Landers v. National Railroad Passenger Corp., et al*, 814 F.2d 41 (1st Cir. 1987). The court agreed that neither the statutory language nor the legislative history of the Act supported Landers' assertion that he was entitled to representation by a minority union at company-level proceedings. The court also emphasized that federal labor policy favored control of the grievance process by the bargaining representative, and that the Amtrak/BLE agreement was consistent with that policy.

SUMMARY OF ARGUMENT

The Railway Labor Act was enacted to foster industrial peace by sanctioning the employees' right to choose a majority representative, to bargain collectively and to resolve disputes with their employer through that representative. Nothing in the RLA restricts the right of a craft representative and a railroad to enter into a collective bargaining agreement which permits only that union to represent an employee in company-level grievance proceedings. In fact, in Section 3, First (i) of the Act, 45 U.S.C. § 153, First (i), Congress specifically provided that employee disputes such as disciplinary matters would be handled in the "usual manner." At Amtrak, the "usual manner" as established by both the BLE and the UTU agreements and the established practice at the Company, is for employees to be represented only by the union representing the affected employee's craft or class.

Had Congress intended to provide Landers with the right to select a minority union to represent him at a company proceeding governed by Section 3, First (i), it would have expressly done so as it did in Section 3, First (j), which specifically provides employees the right to

select any representative for disputes appealed to the National Railroad Adjustment Board. This failure by Congress to provide employees with similar rights at company-level proceedings under Section 3, First (i) demonstrates that Congress did not intend to establish such rights for the first level of dispute resolution.

Nothing in Section 2, Eleventh of the Act—the only statutory provision now relied upon by Landers—suggests otherwise. That section allows union shop provisions for operating crafts of employees to be satisfied by membership in any of the established unions representing such employees. It was designed *only* to protect employees with a tradition of inter-craft mobility from a de facto requirement of dual union membership. Neither the language of that statutory provision nor its legislative history support Landers' claim that it conveyed the far broader right to designate a minority union to represent him at a proceeding convened under the majority union's contract.

Moreover, the few decisions relying on Section 2, Eleventh (c) or other provisions of the Act to extract statutory support for invalidating exclusive representation rules are either factually distinguishable or simply misinterpret the Act in rationalizing the desired result. Although Landers obviously has a personal interest in selecting the union of his choice to represent him before the company, there is simply no persuasive statutory basis for his claim or for limiting the discretion of the employer and the collective representative to enter into an agreement assigning the responsibility for representation at the company hearing to the craft representative.

The fragmentation of representation responsibility for company-level grievance handling is inconsistent with both the trend and present state of labor policy under the NLRA and RLA. The decisions of this Court since 1950 have repeatedly recognized the importance of collective representation in the administration of collective

bargaining relationships. There is no reason here to bend the statute to permit minority union representation at a company-level grievance or discipline hearing. An employee who believes he or she has been improperly represented has judicial, political and administrative remedies available. It is both unnecessary and counterproductive to stable labor relations to require an employer and its majority labor representative to permit an employee to be represented by a minority union in the initial stages of grievance handling.

ARGUMENT

I. IN SECTION 3, FIRST (i), CONGRESS PROVIDED THAT EMPLOYERS AND LABOR UNIONS ARE FREE TO NEGOTIATE PROCEDURES FOR HANDLING COMPANY-LEVEL DISCIPLINARY AND GRIEVANCE PROCEEDINGS, INCLUDING RESTRICTIONS ON EMPLOYEE REPRESENTATIVES.

A. The Parties, By Conduct And/Or Agreement, Create A "Usual Manner" For Processing Grievances At The Company Level.

The cornerstone of the Railway Labor Act is the right of employees to choose a majority representative and to have that representative bargain and resolve disputes on the employees' behalf. The Act, which itself was agreed upon by railroads and labor unions, embodies a "basic congressional policy of self-adjustment of the industry's labor problems between carrier organizations and effective labor organizations." *International Association of Machinists v. Street*, 367 U.S. 740, 759 (1961). *See generally, Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969).

In furtherance of this policy of self-adjustment, Congress left to the railroads and craft representatives the right to establish procedures to resolve grievances concerning the interpretation or application of a bargaining

agreement—so-called "minor disputes." *Elgin, Joliet and Eastern Railway v. Burley*, 325 U.S. 711, 725-27 (1945), *aff'd on rehearing*, 327 U.S. 661 (1946). Section 3, First (i) of the Act, 45 U.S.C. § 153, First (i), provides that a railroad and its unions will establish customary procedures, or the "usual manner", for the handling of such grievances and disciplinary matters prior to arbitration before the National Railroad Adjustment Board. That section states:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, . . . *shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes;* but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes. (Emphasis added).

The logical reading of this provision is that the "usual manner" for handling disputes at the company level is the "customary way . . . in which disputes have been resolved by a given railroad and its workforce." *Landers*, 814 F.2d at 46.

The procedures for resolution of a claim before the National Railroad Adjustment Board, unlike the dispute handling procedures at the company level, are not left to the parties but rather are expressly delineated in the Act. In contrast to the congressional deference embodied in Section 3, First (i) to the parties' "usual manner" of resolving disputes while still at the railroad, Section 3, First (j) grants specific rights to the individual employee. These rights include the right to be heard "in person, by counsel, or by other representatives, as they may respectively elect . . . ." 45 U.S.C. § 153, First (j).

As the lower courts recognized, this distinction by Congress between company-level proceedings, governed by Section 3, First (i), and Adjustment Board arbitration proceedings, governed by Section 3, First (j), establishes that Congress did not intend to guarantee the employee's prerogative to designate a minority representative at the company level:

> *Congress obviously knew how to employ language bestowing elective rights of representation upon workers, yet chose to do so only for hearings before the Board.* In stark contrast to the largesse granted unequivocally by § 3, First (j), the draftsman stated merely that resolution of minor disputes at the company level would be handled in the "usual manner." 45 U.S.C. § 153, First(i). *The fact that Congress eschewed conferment of a specific right of elective representation in § 153, First(i), directly preceding § 153, First(j), forcefully imports the absence of any intent to mandate such a rule at the company level.*

Id. at 44 (emphasis added).

This marked difference in representation rights at the two levels of dispute resolution has been determinative in a number of other cases upholding exclusive representation rules similar to Amtrak's. *E.g., Butler v. Thompson*, 192 F.2d 831, 833 (8th Cir. 1951) ("The statute recognizes a distinction between proceedings on the company level and those before the Adjustment Board when there is in effect a collective bargaining contract. In investigations, conferences or hearings by or before officers of the carrier an existing legal contract controls, whereas the procedure before the Board is controlled by the statute"); *Broady v. Illinois Central Railroad*, 191 F.2d 73, 76-77 (7th Cir. 1951), *cert. denied*, 342 U.S. 897 (1951) ("We can find no provision of the Railway Labor Act which gives to employees the right to a representative of their own choice at an investigation by company officials. . . ."); *Switchmen's Union v. Louisville and Nash-*

ville Railroad, 130 F. Supp. 220, 227 (W.D. Ky. 1955) (Section 3, First (i) "indicates strongly that the 'usual manner' would be determined by a contract between the carrier and the chosen bargaining agent of the employees and could be limited as provided in the case at bar . . . .").[2]

Thus, the lower courts properly concluded that Section 3 of the Railway Labor Act, when read as a whole, provides BLE and Amtrak with the discretion to define representation rights for employees at discipline and grievance proceedings convened under the bargaining agreement.

B. The "Usual Manner" At Amtrak Is To Restrict Representation Of Employees To The Collective Bargaining Representative.

After deciding that the statute permitted a carrier and a majority representative to determine the usual manner for handling minor disputes, the only pertinent issue remaining for the courts was to determine, as a factual matter, what the "usual manner" was at Amtrak. On that point, the record is clear. As the parties' stipulated facts reveal, and as explicitly found by the courts below, Amtrak's 'usual manner' as defined in both the UTU and BLE agreements is "to allow only the collective bar-

[2] In fact, the RLA does not even guarantee an employee the right to be represented by his own attorney at company proceedings. While the RLA provides that an employee may appear by counsel in proceedings before the National Railroad Adjustment Board, the choice of a representative at a company-level proceeding can be restricted by the applicable collective bargaining agreement. *See Marcello v. Long Island R.R.*, 465 F. Supp. 54, 59 (S.D.N.Y. 1979); *D'Amico v. Pennsylvania R.R.*, 191 F. Supp. 160 (S.D.N.Y. 1961). Moreover, courts are not free to go beyond the contract to require a different result; the procedures followed in an investigative hearing, including the representation to which an employee is entitled, are governed by the applicable collective bargaining agreement. *United Steelworkers of America Local 1913 v. Union R.R.*, 648 F.2d 905, 911 (3d Cir. 1981).

gaining agent to help employees at company-level disciplinary hearings." 814 F.2d at 47. *See* Jt. App. at 69-71. Thus, as the First Circuit concluded, "under the Agreement and the 'usual manner' language of § 153 First (i), Landers had no basis for insisting that the UTU participate in his disciplinary hearing." *Id.*

II. SECTION 2, ELEVENTH (c) WAS DESIGNED SOLELY TO PREVENT COMPULSORY DUAL UNIONISM AND WAS NOT INTENDED TO SUBVERT A COLLECTIVE BARGAINING REPRESENTATIVE'S RIGHT TO ADMINISTER THE CONTRACT.

Landers does not challenge the lower courts' ruling that the "usual manner" at Amtrak is for only the craft representative to represent employees at company-level proceedings. In fact, he makes no attempt to discuss Section 3, First (i) and its deference to the parties' usual manner of handling such disputes. Instead, he focuses exclusively on Section 2, Eleventh (c) of the Act to support his claim that he is entitled to have a minority union represent him at company proceedings.[3] That provision allows employees in engine, train, yard or hostling service to satisfy union shop provisions by belonging to any of the labor organizations within the first division of the NRAB.[4] In his view, the right to belong to the

[3] In the courts below, Landers relied on other provisions of the RLA to support his claim, all of which were rejected. As indicated by his brief to this Court, he apparently no longer relies on other provisions of the Act but rests exclusively on Section 2, Eleventh (c).

[4] Section 2, Eleventh (c) was part of the 1951 amendments to the RLA which permitted union shop clauses for the first time. Subsection (c) provides, in pertinent part, that:

> The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service . . . if said employee

UTU necessarily encompasses the right to be represented by that union in disciplinary hearings conducted by Amtrak.

Landers repeatedly asserts that such an attendant right is conveyed by the "plain meaning" of Section 2, Eleventh (c). However, the only discernible meaning evident in both the express language and the legislative history of this provision is a congressional desire to minimize the financial burdens of dual unionism for employees with high intercraft mobility. Nothing in the words or the history of this provision indicates it was intended to encompass grievance representation rights. For example, the statute refers only to satisfying a requirement of union membership. It neither requires the designated union to represent the employee in grievances relating to work outside the craft in which it is the collective representative, nor does it disable the official collective representative from seeking the right to represent all employees in grievances relating to the craft over which it has responsibility.

Moreover, it is clear from its legislative history that Section 2, Eleventh (c) was designed for the limited purpose of alleviating the adverse effects arising from temporary service in a craft other than the one in which an employee customarily worked. As this Court has explained, the job groups of railroad operating employees—engineers, firemen, trainmen, conducters, etc.—were generally divided into separate crafts, represented by different unions. *Pennsylvania Railroad v. Rychlik*, 352 U.S. 480, 490 (1957). However, there was a high degree of

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shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Chapter and admitting to membership employees of a craft or class in any of said services; and no [checkoff] agreement . . . shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership. . . .

job mobility in which individuals might serve temporarily in other crafts:

> Under the ordinary union-shop contract, such a change from craft to craft, even though temporary, would mean that the employee would either have to belong to two unions—one representing each of his crafts—or would have to shuttle between unions as he shuttles between jobs. The former alternative would, of course, be expensive and sometimes impossible, while the latter would be complicated and might mean loss of seniority and union benefits.

Id. (footnote omitted). This problem resulting from inter-craft mobility was first noted during Senate and House Committee hearings on the proposed amendments. *Hearings before the House Committee on Interstate and Foreign Commerce, on H.R. 7789*, 81st Cong., 2d Sess. 30-36, 78 (1950); *Hearings before a Subcommittee of the Senate Committee on Labor and Public Welfare, on S. 3295*, 81st Cong., 2d Sess. 65, 69 (1950). Although the bill left the Committees with no resolution of the issue, H.R. Rep. No. 2811, 81st Cong., 2d Sess. 7 (1950), the problem was again addressed during floor debate.

The initial amendment proposed during Senate consideration of the bill provided that "no such agreement shall require membership in more than one labor organization." Senator Hill noted:

> It is the intention of this proviso to assure that in the case of such promotion or demotion, as the case may be, the employee involved shall not be deprived of his employment because of his failure or refusal to join the union representing the craft or class in which he is located if he retains his membership in the union representing the craft or class from which he has been transferred.

96 Cong. Rec. 15,736 (1950).

This provision was not approved prior to Senate adjournment. Following the recess, however, the legislators

addressed the problem of inter-craft mobility with a new provision drafted with the railway unions' assistance. This provision, which became (and remains) the text of Section 2, Eleventh (c), was intended to serve the same purpose as the previous version. The only difference in the two is that the later version that was ultimately enacted spells out in more detail the reasons for the amendment. 96 Cong. Rec. 16,268 (1950) (remarks of Sen. Hill).

Additionally, Senator Hill explicitly notes the narrow purpose of the provision:

> The amendments deal solely and entirely with railroad employees and go to the question that no man working for a railroad shall be required to belong to more than one labor organization. *That is the whole intent and purpose of the amendments* . . . What the amendments do is simply to spell out the one proposition that no employee of a railroad shall be required to belong to more than one union . . . In the railroad industry there is a peculiar situation [of craft mobility] which perhaps does not exist in any other industry. *The only purpose of the amendment is to make sure that a person employed by one of the railroads does not have to belong to more than one union.*

Id. (emphasis added). Accordingly, as this Court has concluded, Section 2, Eleventh (c) was enacted for a very specific and limited purpose: "[T]he only purpose of Section 2, Eleventh (c) was a very narrow one: to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changes crafts." 352 U.S. at 492 (footnote omitted). In light of this narrow purpose,[5] Section 2,

[5] Indeed, the factual predicate for Section 2, Eleventh (c)—intercraft mobility—simply does not exist at Amtrak. Thus, the statutory rationale for allowing Landers to satisfy the BLE union shop requirement by belonging to the UTU is not present here. Accordingly, while Amtrak has not challenged Landers' right to belong to the UTU while enjoying the fruits of the BLE's labors, there is certainly no valid reason to extend the reach of Section 2, Eleventh (c) in this case to allow him to use a minority union at company-level proceedings.

Eleventh (c) cannot support Landers' contention that simply because he is permitted to belong to the UTU, the UTU must be permitted to intrude into hearings convened under the Amtrak/BLE agreement.

III. THE DECISIONS INVALIDATING EXCLUSIVE REPRESENTATION RULES ARE NOT ONLY FACTUALLY DISTINGUISHABLE BUT ALSO MISCONSTRUE THE RAILWAY LABOR ACT.

As discussed above, Section 3, First (i) reveals a congressional deference to the usual manner negotiated for handling grievances, and Section 2, Eleventh (c) gives no support to any proposition other than an operating employee's right to satisfy a union shop requirement by belonging to any of the operating craft unions. However, two circuit courts and a district court have concluded —based on the facts before them—that contractual rules requiring exclusive representation are invalid because the Act guarantees operating employees the right to select a minority union to represent them before the company. *Taylor v. Missouri Pacific Railroad*, 794 F.2d 1082 (5th Cir.), *cert. denied*, 107 S.Ct. 670 (1986); *McElroy v. Terminal Railroad Association of St. Louis*, 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 1015 (1969); *Coar v. Metro-North Commuter Railroad*, 618 F. Supp. 380 (S.D.N.Y. 1985). These decisions, while distinguishable factually, nonetheless misinterpret the Railway Labor Act in a strained effort to find support for their desired result.

McElroy, the earliest of these decisions and the foundation of the latter two, concerned a new collective bargaining agreement between the engineers' union and the

railroad which limited representation at company-level proceedings to the craft representative. The agreement deviated from the former practice on that railroad which had permitted employees, who shuttled between the crafts of engineers and firemen, to select either of the two unions to represent them.[6] 392 F.2d at 967-69. As Judge Keeton noted:

> It was the deviation from this usual manner that occurred when one union signed an exclusive representation agreement of which plaintiffs complained in *McElroy*. The Seventh Circuit based its ruling that the exclusive representation agreement was impermissible largely on the facts of that case: the practice of shuttling between crafts and the long-standing practice of representation by an employee's own union. Indeed, in *McElroy* the Seventh Circuit declined to overrule *Broady v. Illinois Central Railroad Co.*, 191 F.2d 73 (7th Cir. 1951), *cert. denied*, 342 U.S. 897, in which on different facts it had refused to invalidate an exclusive representation agreement: [That case] did not involve the unique situation here where employees shuttle back and forth between their crafts. *McElroy*, 392 F.2d at 971.

Pet. App. at 31a.

In the *Taylor* case, the Fifth Circuit was similarly faced with the "unusual characteristic of the railroad industry: the shuttling back and forth between crafts (and union jurisdiction) of employees traditionally organized along craft lines." 614 F. Supp. 1320, 1323 (E.D. La. 1985). In contrast, at Amtrak there is no

[6] In *McElroy* the plaintiffs began employment as firemen, a craft represented by the Brotherhood of Locomotive Firemen and Enginemen (BLF&E) and were later promoted to engineers, a craft represented by BLE. They retained seniority in both crafts and moved back and forth between fireman and engineer positions, depending upon the needs of the carrier. 392 F.2d at 967. The lawsuit arose when the BLE and the railroad negotiated a new agreement limiting representation of engineers to the BLE. *Id.* at 968-69.

intercraft mobility and the Company has an established "usual manner" of restricting representation to the craft representative; therefore, this Court has ample grounds to affirm the First Circuit's decision on these different facts and leave the two other circuit courts' decisions unaffected.

Amtrak would suggest, however, that even though these decisions are distinguishable, their holdings derive from erroneous interpretations of the Railway Labor Act that should not guide the Court in this case. The *Taylor* decision, for example, as well as the district court decision in *Coar*, never mentioned Section 3, First (i) or its reference to the "usual manner."[7] This provision is an important statutory guidepost in defining the grievance role of the majority union and must be considered when deciding the propriety of exclusive representation rules.

These courts also misinterpret other provisions of the Act in an effort to find statutory support for their position. Section 2, Second of the Act, 45 U.S.C. § 152, Second, is viewed by all three courts as affirmatively providing individual employees with the right to pursue grievances through any representative they choose.[8] *See McElroy*, 392 F.2d at 969; *Coar*, 380 F. Supp. at 383, *Tay-*

[7] As the First Circuit noted, because there is no intercraft mobility at Amtrak and the "usual manner" consistently restricts representation to the collective bargaining representative, *McElroy* "reinforces—rather than undermines—our rejection of *Taylor*." 814 F.2d at 48, n.4.

[8] It is noteworthy that in the courts below Landers emphasized several provisions of Section 2 as support for his claim that the RLA entitles him to designate the UTU to represent him at company proceedings. In his brief to this Court, he no longer relies on any provision except Section 2, Eleventh (*e*). In its discussion of the *McElroy* and *Taylor* decisions Amtrak argues that these provisions do not support the petitioner's claim. To stretch them to reach this situation would call into question well-settled and important principles of exclusive representation.

lor, 794 F.2d at 1086. This provision, however, is merely a general statement describing the duties of railroads and employees:

> All disputes between a carrier or carriers and its or their *employees* shall be considered, and, if possible, decided, with all expedition, in conference between *representatives designated* and authorized so to confer, respectively, by the carrier or carriers and *by the employees thereof interested in the dispute.* (Emphasis added).

45 U.S.C. § 152, Second. As the First Circuit noted: "It comprises a broadly general reference to the many kinds of controversies that might arise, not to specific procedures or to particular rights in dispute resolution proceedings between parties." 814 F.2d at 44.[9]

The express language in Section 2, Second reinforces the conclusion that this section does not establish an individual employee's right to designate any representative in grievance proceedings at the company level. Properly interpreted, the phrase "representatives designated . . . by the employees thereof interested in the dispute" means the *union* designated by the craft or class of employees

[9] Congress left to other provisions of the Act the delineation of how a representative is designated for a particular purpose. Section 2, Fourth, 45 U.S.C. § 152, Fourth, for example, specifies that a majority vote of employees "interested" in collective bargaining will designate their craft representative. Section 3, First (j), 45 U.S.C. § 153, First (j), provides that parties appearing before the NRAB may designate "counsel" or "other representatives" to act on their behalf. *See also* Section 2, Ninth, 45 U.S.C. § 152, Ninth (National Mediation Board shall investigate and, if appropriate, cause an election when there is a dispute as to "who are the ["designated"] representatives of employees"). Thus, because other provisions of the Act define specifically how representatives are to be chosen with respect to particular disputes, the general prefatory language of Section 2, Second does not create a right on behalf of the employee interested in a particular disciplinary dispute to designate a minority union. *Landers v. National Railroad Passenger Corp.*, Pet. App. at 25a-26a.

as their representative, pursuant to the Act, and not any person designated ad hoc by an individual employee to confer with the carrier. This interpretation is supported by the definition of the term "representative": for purposes of the RLA, that term means "any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by *its* or *their employees*, to act for it or them." 45 U.S.C. § 151, Sixth (Emphasis added). That the plural "employees" is intended to be collective, including all employees as a unit rather than as individuals, is evident from the careful use of both singular and plural in reference to the "carrier or carriers," or to "person or persons." Contrast the language of Section 3, First (i) which refers to "an employee or group of employees." 45 U.S.C. § 153, First (i).

If Section 2, Second is construed to provide a right to minority union representation in grievances, or "minor disputes", it must also provide the same right in disputes over the formation of the agreement, or so-called "major disputes." The wording of the provision applies to *all* disputes—"minor" and "major"—subject to processes of the Act, not merely company grievance hearings. Minority union representation in major disputes is at odds with the fundamental representation and bargaining structures created by the Act. The petitioner union has neither acknowledged nor rationalized this domino effect of reliance on Section 2, Second. Perhaps this is the reason petitioner does not present this argument in its brief to the Court. It proves too much because it compromises the concept of exclusive representation. *See generally* Amicus Brief of AFL-CIO and RLEA at 16-20.

McElroy and its progeny misread other provisions of the Act as well. For example, they referred to Section 2, Third which provides that representatives "designated by the respective parties" need not be employees of the carrier, and that employees and carriers can designate

their respective representatives without "interfer[ence]" from the other. 45 U.S.C. § 152, Third. This provision, however, was enacted only to prohibit a railroad's interference in its employees' selection of a collective bargaining representative, and offers no guidance on individual representation in company-level grievances.[10]

In fact, a close reading of the legislative history of Section 2 reveals a reluctance by Congress to legislate the expanded right sought in this case. Both *McElroy* and *Coar*, which simply relied on *McElroy's* reading of the RLA's legislative history, refer to testimony of two witnesses before a House Committee as support for the conclusion that the statute guarantees minority representation at company proceedings. *See McElroy*, 392 F.2d at 969, *Coar*, 618 F. Supp. at 384. However, the remarks cited were offered in support of an unsuccessful proposal to *change* the language of Section 2, Fourth of H.R. 9689 to allow an individual employee to select representatives other than the collective bargaining representative to pursue grievances with the railroad. The proposed Section 2, Fourth of H.R. 9689 contained the following sentence: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." Commissioner Eastman suggested a change, referring to the language in *Pennsylvania Railroad System Federation v. Pennsylvania Railroad*, 267 U.S. 203 (1925), which indicated that under the old RLA union members had the right to present grievances by representatives of their choice:

> *I think some qualification should be contained in this act* . . . I should like to work out an amendment which will cover that point . . . .[11]

Mr. Harrison likewise stated:

> We would like to offer an amendment to the language as it is written . . . and that is designed to make it clear that the individual employee, or a group of individuals involved in grievances, are not prevented from having representatives to handle their grievances that are not representatives of the majority.

Id. at 89. The change in Section 2, Fourth proposed by Harrison and Eastman was rejected; Section 2, Fourth was carried essentially verbatim from H.R. 9689 into the present law. Accordingly, the fact that such changes were sought, and were defeated, undercuts the view that the statute affirmatively requires minority union representation.

Those cases which advocate a minority union's entitlement to participate actively in company-level grievance proceedings are relying on facts that are inapposite and statutory constructions that are tortured. The "usual manner" at Amtrak is well-established and entails only bargaining representative participation in company-level grievance handling. Moreover, there is no shuttling back and forth between crafts at Amtrak. The facts

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[10] This provision was added by the 1934 amendments to the RLA and the principal draftsman of those amendments, Joseph B. Eastman, Federal Coordinator of Transportation, testified as follows concerning its purpose:

> The principle is simply that the employees shall be free to join and be represented by any labor organization that they wish to join and to have as their representative, and that the railroads shall in no way interfere with their freedom of choice, directly or indirectly. If a company union is what the employees really want, they are free to have it, and the same applies to the American Federation of Labor.

Railway Labor Act Amendments: Hearings on H.R. 7650 before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 22-23 (1934).

[11] Railway Labor Act Amendments: Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 7650 [Predecessor of H.R. 9861], H.R. 9689, and S. 3266, 73rd Cong., 2d Sess. 44 (May 22-25, 1934).

in this case are not comparable to those where minority union participation was allowed during company-level proceedings. *McElroy*, *Taylor* and *Coar* impose ill-fitting statutory language on the company-level grievance process and either ignore or give short shrift to the controlling provisions. These decisions should therefore not guide this Court in its resolution of this case.

IV. EXCLUSIVE REPRESENTATION BY THE CRAFT REPRESENTATIVE IN COMPANY-LEVEL PROCEEDINGS FOSTERS THE RLA'S GOAL OF STABILITY IN LABOR RELATIONS.

In reaching the conclusion that Section 2, Eleventh (c) does not entitle Landers to minority union representation at proceedings convened under the BLE agreement, the lower courts properly balanced the interests of both the BLE and Landers:

> The RLA thus accommodates two sometimes conflicting interests—the interest in furthering collective bargaining for a craft as a whole and the interest in saving employees from the burden of frequent changes in union membership. *Because the right to belong to the union of one's choice arises in this special context of competing interests, that right may not automatically include subsidiary rights, such as the right of representation in company disciplinary hearings*, that might otherwise be thought necessary and incidental.

814 F.2d at 45 (emphasis added) (*quoting*, *Landers v. National Railroad Passenger Corp.*, No. 84-467-K, slip. op. at 11 (D. Mass. June 24, 1986). The lower courts concluded that the bargaining representative's interest in representing all craft members at the company level outweighed the employees' preference for separate representation.

Although protecting the interests of individual employees has always been a core concern of federal labor policy, *Elgin, Joliet and Eastern Railway v. Burley*, 325

U.S. 711 (1945), it has long been established that the best way to protect individual employee rights is through collective action. *Emporium Capwell Co. v. Western Addition Community Association*, 420 U.S. 50, 62 (1975). "Thus only the union may contract the employee's terms and conditions of employment and provisions for processing his grievances. . . ." *Allis-Chalmers*, 388 U.S. at 180. One majority union represents all employees in a craft systemwide and there can be no minority representation. *Virginian Railway v. System Federation*, 300 U.S. 515 (1937); *Switchmen's Union v. NMB*, 320 U.S. 297 (1943). The bargaining representative will fairly represent the craft member's claim on the company level, as it has a duty to do so. *Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Steele v. Louisville and Nashville Railroad*, 323 U.S. 192 (1944). Indeed, as this Court has noted previously, the duty of fair representation arose as a way of reconciling individual interests with the need for exclusive bargaining by the majority union. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 181 (1967).

The concepts of majority rule and the duty of fair representation have progressed together through jurisprudence in this Court for the last thirty-five years. Coincident with this progression has been the necessary contraction of the individual rights of employees to act outside the scope of collective activity. *Andrews v. Louisville & Nashville Railroad*, 406 U.S. 320, 324 (1972) (restricting employees' access to tribunals other than the statutory dispute-resolution procedure); *cf., Slocum v. Delaware Lackawanna & Western Railroad*, 339 U.S. 239 (1950); *Order of Railroad Conductors v. Southern Railway*, 339 U.S. 255 (1950). If this Court disturbs the important foundation of majority rule by allowing minority factions, in the form of rival unions, to participate in carrier-level grievance proceedings, then it will compromise the majority union's duty of fair representation

to all employees during the processing of grievances. *Vaca*, 386 U.S. at 177.[12]

Nothing in *Elgin* is to the contrary. In *Elgin*, this Court addressed the right of the individual employee to represent himself before the employer and the NRAB, not the right of a rival union to intrude on the carrier-level grievance procedure, a natural extension of the collective bargaining process. Moreover, *Elgin* makes only marginal reference to the duty of fair representation, 325 U.S. at 733-34, nn.30-31, which was in its infancy when *Elgin* was decided. The subsequent hand-in-hand development of the fair representation duty and the concept of exclusive majority representation resolves the concerns expressed in *Elgin* for protection of minority interests while at the same time guaranteeing the protection of all employee rights through collective action.

Furthermore, the majority union's representation of Landers at the company level will further both his interest and that of others who may be similarly situated in the future. The resolution of grievances or disciplinary actions, even on the company level, will inevitably affect the future administration of a collective bargaining agreement because each individual solution forms the culture of the workplace.[13] As the craft's bargaining

[12] Although Landers suggests that the UTU has a legally enforceable obligation to represent members at company-level proceedings and faces the specter of liability for fair representation claims when it does not do so, such fears are unfounded. *Wells v. Order of Railway Conductors and Brakemen*, 442 F.2d 1176 (7th Cir. 1971).

[13] Although the Fifth Circuit in the *Taylor* case observed that the union may be "interested only inferentially in a particular disciplinary or grievance hearing," 794 F.2d at 1086, such a conclusion runs counter to the recognized principle that the bargaining agreement is not fixed upon the execution date but rather develops in its day to day administration. The imposition of discipline in a particular case or an individual grievance may hold enormous significance for the entire craft. Indeed, in a grievance case such as one resolving a craft employee's claim to certain work, the ultimate

representative, the BLE should be permitted to pursue its conception of the best interests of all the craft members. If the bargaining representative acts arbitrarily, judicial and political remedies are available to the employees.

Moreover, because it is the official bargaining representative, the BLE has a preexisting established relationship with the carrier which should enure to Landers' benefit during the company-level proceedings. Landers thus doubly benefits from the BLE's representation—both as an individual and as a member of the craft of engineers.

In addition to these practical considerations, the representation of craft members at the company level is part and parcel of the BLE's duty to represent the class in collective bargaining. As this Court has noted:

> Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract.

Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965).[14] *Accord, e.g., Cox, The Duty To Bargain Collectively During the Term of an Existing Agreement*, 63 Harv. L. Rev. 1097, 1100 (1950) ("Contract negotiations are the legislative process of collective bargaining; the day-to-day working out of plant problems is its administrative or judicial aspect . . . ."). In fact, the legitimate interest of the majority representative was em-

decision may seriously impact on the work of the entire bargaining unit.

[14] Although this case arose under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, these policy considerations are equally important in the RLA. *See, e.g., Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 347 (1944); *Linder v. Berge*, 739 F.2d 686, 689 (1st Cir. 1984).

phasized by the UTU in its petition for certiorari to this Court in the *Taylor* case. In that petition, UTU presented a relevant argument based on federal labor policy in support of its prerogative to serve as the exclusive representative on the property:

> In short, the authority to bargain collectively is exclusive; exclusivity is a policy imposed to foster stable labor relations; since collective bargaining includes grievance handling with the employer, exclusivity should attach here as well so as to comport with the policy of the law and ensure stable labor relations in grievance handling.

UTU's Petition for Certiorari at 7-8 (attached to Amtrak's Brief in Opposition to Certiorari, filed November 7, 1987).

Admittedly, Landers has a statutory right to have whomever he wishes represent him in proceedings before the NRAB, 45 U.S.C. § 153, First (j). It also cannot be gainsaid that NRAB-level decisions may influence the "day-to-day" interpretation of the collective bargaining agreement. Nevertheless, proceedings at the company level involve considerations that are different from those before the NRAB. These factors militate against bending the statute to strip the majority union of its prerogative to serve as the employees' grievance representative. Emotions can run high and feelings are often raw during grievance proceedings that take place on the company property. The potential for contentiousness entails a risk that other employees will become involved in the dispute. Although the proceeding is investigatory, it is also adversarial. In that environment, the bargaining representative should be permitted to control the employee side in the interest of overall stability. In addition, initial proceedings are those where the dispute is most likely to settle, since parties are not yet "entrenched" in their respective positions. Absent statutory disablement, the authorized bargaining agent should represent the employee to permit it to accommodate, in the

context of possible settlement, the interests of the employee and the group. If the employee is dissatisfied with the union's position, he or she can take the grievance to the NRAB.

Representation by the majority union therefore promotes labor stability and encourages settlement. With regard to the former, the bargaining representative is in a position to control a situation that could detrimentally affect the stability of labor relations at the workplace. The objectives of a minority union, on the other hand, might be furthered by division and discord. With respect to settlements, the majority union is best positioned to work out the dispute in a manner satisfactory to all. The representatives of both the union and employer regularly deal with the administration of the agreement and are experienced in the art of compromise as applied in the context of that agreement. Finally, the presentation of these grievances by the majority union allows it to enhance its status with the employees and to cement its status as their bargaining representative with the carrier. *Cf. Republic Steel*, 379 U.S. at 653. Such status and prestige make the union a more forceful and effective representative. At the same time, labor-management relations improve as each side exhibits the ability to solve joint problems.

Conversely, guaranteeing a minority union the right to represent employees during on-property disputes undermines the majority representative's status and decreases labor relations stability. Although, as the UTU has stated, this Court did recognize in *Felter v. Southern Pacific Co.*, 359 U.S. 326 (1959), that Section 2, Eleventh (c) allows solicitation by rival organizations, the right to proselytize is a far cry from the active discord that can occur when minority unions are permitted principal roles in company level proceedings. Proper solicitation by a minority union does not actively interfere with the preexisting collective bargaining relationship. Griev-

ance representation, on the other hand, plunges a minority union into a delicately-established bargaining relationship. A rival minority union, like the UTU in this instance, if allowed to represent grievants at the carrier level, has an incentive to be disruptive rather than constructive. There is a temptation to pursue even frivolous claims to disrupt the present order and create the medium for political change. A minority union with no status in a craft or class has little interest in promoting the smooth operation of the majority union's grievance procedure.[15] These activities destabilize the collective bargaining relationship and create difficulties for the majority union. As Professor Cox has noted:

> Vesting the union with control of all grievances increases the likelihood of uniformity and therefore reduces 'a potential source of competitions and discriminations that could be destructive of the entire structure of labor relations in the plant.' To deny the majority representative power to control the presentation of grievances offers dissident groups, who may belong to rival unions, the opportunity to press aggressively all manner of grievances, regardless of their merit, in an effort to squeeze the last drop of competitive advantage out of each grievance and to use the settlement even of the most trivial grievances as a vehicle to build up their own prestige.

Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 626 (1956). The rival union thus has nothing to lose and everything to gain by divisive conduct. Such

[15] Landers, who is represented before this Court by the UTU, is seeking not only to gain the representation of a union to whom he pays dues but to further the institutional interest of UTU as a rival union to BLE. The affidavits of Messrs. Landers, E.J. Fisette and R.A. Herz discuss Landers' attempts to represent other UTU members, "his people," in grievances before Amtrak management. Jt. App. at 77-78, 85-86, 89-91. Moreover, twice in the past three years, representation elections between the BLE and UTU have been conducted at Amtrak by the National Mediation Board. 13 NMB No. 44 (1986); 12 NMB No. 41 (1985).

conduct is contrary to the objectives of the Railway Labor Act and should not be legitimized by a strained reading of the provisions enacted for other purposes.[16]

In short, allowing minority unions the right of representation at the company level will unnecessarily disrupt the collective bargaining/grievance resolution system with the politics of inter-union rivalry. The institutionalization of a rival union in the grievance adjustment process can only undermine the majority representative's status, and therefore jeopardize labor relations stability. The Court should not permit "independent representation" by minority unions to serve as a proxy for the majority union's duty of fair representation. It is unnecessary, and the labor relations costs are too high. The

[16] Petitioner cites *Brotherhood of Locomotive Engineers v. Denver & Rio Grande Western Railroad*, 411 F.2d 1115 (10th Cir. 1969) and *General Committee of Adjustment v. Burlington Northern, Inc.*, 563 F.2d 1279 (8th Cir. 1977), which hold that a minority union may convene a public law board, in support of his argument that a minority union may represent him at carrier-level grievance proceedings. These cases are inapposite; the availability of public law boards is not before the Court because the record reflects that the petitioner did not seek one in this instance. Moreover, even if the availability of public law boards were at issue, the issue should be decided against the petitioner. The Eighth and Tenth Circuits' interpretation of the statutory language authorizing variant system adjustment boards, 45 U.S.C. § 153, Second, is strained. These courts interpret "the representative of any craft or class . . ." to refer to the universe of unions that can represent employees in a given craft or class. In fact, this language is better read to guarantee the availability of public law boards to the employees in all crafts or classes on the carrier.

Although the statutory language is ambiguous on its face, the implausibility of petitioner's (and these courts') argument is obvious when one considers the statute as a whole. The same statutory section affirms the right of the *employer* to convene system boards as well. If the petitioner's construction of the provision is adopted, this language would entitle the employer to refer a pending grievance involving one craft to any board of its choice. This is clearly not the provision's intent, as it would impede the dispute resolution process the public law board procedure was intended to facilitate.

lower courts properly determined that "in the context of the Act as a whole," Landers' right to belong to the UTU does not entitle him to select that union to represent him at company-level proceedings. 814 F.2d at 45.

CONCLUSION

For the reasons discussed herein, Amtrak respectfully submits that this Court should affirm the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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REPLY

BRIEF

FOR ARGUMENT

No. 86-2037

In The
Supreme Court of the United States
October Term, 1987

PAUL G. LANDERS,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Petitioner Paul G. Landers submits the following in reply to the brief for respondent National Railroad Passenger Corporation (hereinafter, "Amtrak") and the brief for respondent Brotherhood of Locomotive Engineers

(hereinafter, "BLE"), and with reference to the brief for American Federation of Labor and Congress of Industrial Organizations (hereinafter, "AFL-CIO") and Railway Labor Executives' Association (hereinafter, "RLEA") as *amici curiae* in support of neither party.

ARGUMENT

Section 2 Eleventh(c) of the Railway Labor Act (45 U.S.C. § 152 Eleventh(c) Must Be Given Effect As A Later Enacted Provision

What the *amici* clearly recognize, and respondents fail to recognize, is that the passage of Section 2 Eleventh(c) of the Railway Labor Act (45 U.S.C. § 152 Eleventh(c)) (hereinafter, "RLA"), in 1951 materially affected the resolution of the issue in the case at bar. That is the reason for petitioner's emphasis in opening brief on the presence of Section 2 Eleventh(c) in the RLA. That provision grants an absolute right, now beyond cavil, to railroad operating employees to belong to either the United Transportation Union (hereinafter, "UTU") or BLE in fulfillment of any union shop provision negotiated by either of them. The balance of the Railway Labor Act cannot be used to render this later enactment meaningless. Respondent's position effectively erases Section 2 Eleventh(c) from the Act.

If Section 2 Eleventh(c) created a right to belong to a minority union (and it is clear that Section 2 Eleventh (c) did so as to railroad operating employees, who have a right to choose only between UTU and BLE no matter

which one is the certified representative), the plain meaning of said right to membership must include the right to handle company level grievances and disciplinary hearings, as between those two organizations only. The First Circuit below recognized company level grievance handling is an important attribute of membership. (814 F.2d at 45). Section 2 Eleventh(c) also clearly provides that this right to alternate membership (including grievance and disciplinary handling) applies *only* as between UTU and BLE, and has *no* application to any non-operating railway craft union or to any union covered by LMRA. *See, Pennsylvania R.R. v. Rychlik*, 352 U.S. 480, 493-94 (1957).

The First Circuit's reference below to the "somewhat analogous precincts of the NLRA" (814 F.2d at 45) is inappropriate here. Indeed, as noted by the *amici*, this Court has recognized that the NLRA cannot be imported wholesale into the railway labor arena, and even rough analogies must be drawn circumspectly with due regard for the many differences between the statutory schemes. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969); *see also, Chicago & N.W. R.R. v. United Transportation Union*, 402 U.S. 570, 579, n. 11 (1971). That is precisely petitioner's point here. In 1951, Section 2 Eleventh(c), a later enacted provision, changed exclusivity principles then present in the NLRA and RLA, only to the extent necessary to give effect to the plain meaning of the language concerning "membership" used therein.

That is where the judgment below and the briefs of respondents go awry. The First Circuit below recognized the legitimacy of the interest of an employee to have the

union of membership represent at company level disciplinary proceedings. (814 F.2d at 45). It could hardly have done otherwise. That is where the record is made for all further handling of the claim with the railroad. It is, as was noted in petitioner's opening brief, one of the most critical moments in employment. Yet the court below makes this legitimate interest subservient to the full panoply of exclusive rights of the designated representative under the NLRA. In that regard it qualifies the right just as the bargaining agreement in *Felter v. Southern Pacific Co.*, 359 U.S. 326 (1959) tried, without success, to qualify the right to withdraw from a dues check-off arrangement.

Both respondents do make a fair point with regard to the discussion in petitioner's opening brief regarding the duty of fair representation. Indeed, *Wells v. Order of Ry. Conductors and Brakemen*, 442 F.2d 1176 (7th Cir. 1971) does indicate that the duty of fair representation belongs to the duly designated representative under the RLA. However, assuming the applicability of *Wells* here, the point remains that an operating employee who chooses to be represented by a union otherwise qualified under 2 Eleventh(c) (only UTU and BLE meet such qualifications per *Rychlik*) must have the right to be represented by that union in company-level grievance and discipline matters, if he or she so desires. Any other result would create the anomaly so clearly stated by the Fifth Circuit in *Taylor v. Missouri Pacific R.R.*, 794 F.2d 1082 (5th Cir.), *cert denied sub nom. UTU v. Taylor*, — U.S. —, 93 L.Ed. 2d 721, 107 S.Ct. 670 (1986), that to permit the certified representative to have sole and exclusive rights to handle grievances and disciplinary matters of railroad operating

employees on the property reduces the right to alternate membership in Section 2 Eleventh(c), the latest enacted of the statutory provisions discussed herein, to an absurdity by equating it to that of membership in a social club. *Id.* at 1086. The ability to pursue an action against the majority union fouling the claim on the property beyond retrieval in arbitration, where bad faith must be shown to recover (*Vaca v. Sipes*, 386 U.S. 171 (1967)), cannot affect the immediacy of the right to the representative of choice if Section 2 Eleventh(c) is to have any real meaning.

Additionally, both respondents discuss the "usual manner" of handling grievances, claims and disciplinary matters under 3 First(i) of the Railway Labor Act (45 U.S.C. 153 First(i)), tending to rely upon a factual difference present on Amtrak. It is true that there are no firemen on Amtrak since it began direct employment of operating employees January 1, 1983. But that factual difference cannot have the effect of distinguishing the case at bar from the existing precedent on the issue in *McElroy v. Term. R.R. Ass'n of St. Louis*, 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 813 (1969); *Taylor v. Missouri Pacific R.R. supra*, and like cases discussed in the petitioner's opening brief. Indeed, the First Circuit below, while taking note of this factual difference, declined to base its holding on it; rather holding *Taylor, supra*, very much in point, but wrongly decided. (814 F.2d at 47). As was noted in petitioner's opening brief, whether shuttling was present between or among railroad operating crafts was one of the considerations that the Congress had before it in the passage of Section 2 Eleventh(c), but it did not write that requirement into the statute itself.

The statute is plain on its face. It does not say that the right to membership in a minority union (and, therefore, the right to representation on the property by that union) is dependent upon "shuttling" being present on any given carrier. Just as this Court did not permit the agreement between a union and a railroad in *Felter v. Southern Pacific Co., supra*, to limit a clearly stated statutory right under Section 2 Eleventh(b) to withdraw from the union on the union's form only, so too this Court cannot permit the clear right to membership in a minority union of an operating employee on a railroad (as between UTU and BLE) to be reduced to mere membership in a social club, without involving itself in judicial legislation clearly not warranted by the plain meaning of Section 2 Eleventh(c) or the legislative history surrounding its passage.

While, as Respondent BLE notes, it is true that the primary purpose of Section 2 Eleventh of the RLA was to eliminate the problem of "free riders," it is apparent from the text of Section 2 Eleventh(c) Congress adopted a different modality to deal with that problem among railroad *operating* crafts. It should also be noted that this Court closed the door on unions not having members on the First Division of the National Railroad Adjustment Board in *Pennsylvania R.R. v. Rychlik, supra*. Both UTU and BLE have members on the First Division, and their combined presence contributes to a substantial degree of eliminating the "free rider" problem in grievance handling.

Permitting UTU to represent its members on the property where BLE is the representative will not work a hardship on certified representatives and carriers. That

has been the law and the experience for at least the past twenty years since *McElroy v. Term. R.R. Ass'n of St. Louis, supra*. The parade of horribles suggested by respondents has not even formed up over that period. Exclusivity principles regarding negotiation and administration of agreements mandated by *Virginian Ry. v. System Fed. No. 40*, 300 U.S. 515 (1937) (carrier may not negotiate with union other than the certified representative); *J. I. Case v. NLRB*, 321 U.S. 332 (1944) (individual contracts do not relieve employer of obligation to bargain with certified representative); and *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944) (to the same effect) remain fully applicable.

In sum, as this Court is fully aware, there are many serious problems presently affecting representation and its consequences on the nation's railroads. A railroad operating employee being permitted to have the union of choice represent his or her interests in a disciplinary investigation on the property is not one of them. What is apparent here, however, is that BLE, the lone dissenter to Section 2 Eleventh(c) in its present form (96 Cong. Rec. 17059, cols. 2-3 (January 1, 1951)), is inviting this Court, as it did the lower courts, to judicially amend the statute by permitting a bargaining agreement to qualify the statutory right to alternate membership out of existence for all practical purposes.

CONCLUSION

For the reasons stated here and in Petitioner's opening brief, the judgment below should be reversed.

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RESPONDENT'S

BRIEF

No. 86-2037

In The
Supreme Court of the United States
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PAUL G. LANDERS,

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v.

NATIONAL RAILROAD PASSENGER CORPORATION and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The First Circuit

BRIEF FOR RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS

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QUESTION PRESENTED FOR REVIEW

Does the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, permit provisions in the governing collective bargaining agreement which limit union representation in company-level grievance and disciplinary proceedings to the craft-designated collective bargaining representative?

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On Petition For A Writ Of Certiorari To The United States Ccurt Of Appeals For The First Circuit

BRIEF FOR RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT

Insofar as the brief for petitioner sets forth the undisputed facts submitted to the trial court, the statement of the case is accurate. However, it is significant to the case that respondent National Railroad Passenger Corporation ("Amtrak") was created by the Rail Passenger Service Act of 1970, 45 U.S.C. §§ 541 *et seq.*, but did not employ passenger engineers or, in fact, operating em-

ployees[1] until January 1, 1983. Shortly prior to 1983, Amtrak entered into a labor contract with respondent Brotherhood of Locomotive Engineers ("BLE"), which is the collective bargaining representative for the craft of passenger engineers on Amtrak.[2] The BLE-Amtrak agreement contains a rule specifying that only the involved employees and/or duly designated officials of BLE have the right to attend disciplinary hearings and to process the claims and grievances of engineers through carrier-level proceedings.

A similar rule appears in the Amtrak labor contracts with the United Transportation Union ("UTU"), the union to which petitioner Paul G. Landers ("Landers") belongs and in which he holds office. Amtrak has consistently applied the exclusive representation rule with BLE, so that no passenger engineer employed by it can have a minority or rival union, including UTU, represent that employee in any company-level proceedings. (Jt. App. 26

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1 Railroad "operating employees" is the term for train and engine service crews and refers collectively to the crafts or classes of locomotive engineers, firemen and hostlers, conductors, brakemen, and switchmen.

2 Since the outgrowth of separate freight and passenger or commuter railroads, like Amtrak and Metro-North Commuter Railroad, by reason of the Northeast Rail Service Act of 1981, 45 U.S.C. §§ 1101 *et seq.*, the operating employees of the passenger roads are usually called passenger engineers, assistant passenger engineers, firemen and engine attendants, passenger conductors, assistant passenger conductors, flagmen, and baggagemen. BLE is not only the representative of Amtrak's passenger engineers, but has been the craft representative for firemen and hostlers (engine attendants) on Amtrak since March 11, 1986, at which time it assumed UTU's exclusive representation rule for the members of that craft.

at ¶ 19, 31-43)[3] Under the RLA, disputes growing out of grievances or out of the interpretation or application of the labor contracts which cannot be adjusted at the company-level, are submitted for arbitration to the National Railroad Adjustment Board ("NRAB") or special boards of adjustment, including so-called Public Law Boards. Contrary to the inference contained in the comments set forth on pages 2-3 of petitioner's brief, the involved agreement rules do not restrict petitioner or any other passenger engineer from pursuing any discipline claim or grievance before the First Division of the NRAB or a Public Law Board created by Amtrak and UTU under Section 3, Second of the Railway Labor Act, ("RLA"), 45 U.S.C. § 153, Second, "in person, by counsel, or by other representatives", including UTU, as provided in Section 3, First (j) of the RLA, 45 U.S.C. § 153, First (j). (Jt. App. 70).

Although Amtrak is a relative newcomer to the railroad industry, particularly so in the sense that its first operating employees were transferred from Consolidated Rail Corporation or Conrail on January 1, 1983 (45 U.S.C. § 1113a), BLE has been in existence since 1863 and, as its name indicates, is and has been over the years the collective bargaining representative for the craft of locomotive engineers on the vast majority of the nation's railroads. In some instances, it is also the bargaining representative for the craft of firemen.[4] BLE admits to mem-

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3 References to the Joint Appendix are designed as "Jt. App." and to the Appendix to the Petition as "Pet. App.".

4 Fiftieth Annual Report of the National Mediation Board, p. 33 (Wash. D.C. 1984) (referring to employee representation on a selected group of carriers).

bership any engineer, fireman, or any person who may have a right to become an engineer. As a railway labor organization, national in scope and organized in accordance with the RLA, BLE designates two of the four labor representatives on the First Division of the NRAB. (45 U.S.C. § 153, First (h)).

UTU is the other operating organization qualified to designate two labor representatives on the First Division, NRAB. UTU came into existence on January 1, 1969, as a result of the merger of the Brotherhood of Locomotive Firemen and Enginemen ("BLF&E"), the Order of Railway Conductors and Brakemen ("ORC&B"), the Brotherhood of Railroad Trainmen ("BRT") and the Switchmen's Union of North America ("SUNA"), which names are indicative of the crafts or classes of railroad employees that they represented.[5]

The ORC&B was founded in 1868; the BLF&E, 1873; the BRT, 1883; and SUNA, 1894. As a result of industrial strife on the railroads, the first federal statute dealing with the problem of railroad strikes—the Arbitration Act of 1888—was enacted to provide for the voluntary arbitration and investigation of labor disputes between the railways and their employees.[6] By the time that the amended RLA was passed in 1934, the railroad operating crafts, at least, were well organized and had become adversaries for representation of closely related crafts.

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5 Thirty-Third Annual Report of the National Mediation Board, pp. 98-100 (Wash. D.C. 1968) (employee representation tables).

6 *Railway Labor Act At Fifty*, National Mediation Board (G.P.O., Washington, D.C. 1976).

Since promotion to the craft of locomotive engineers came from on the job training as firemen, BLF&E, as bargaining representative for that craft on most rail carriers, was the avowed antagonist of BLE. *See, e.g., General Committee of Adjustment of Brotherhood of Locomotive Engineers v. Southern Pacific Co.*, 320 U.S. 338 (1943). This rivalry intensified and escalated after the award of Arbitration Board No. 282, 41 *Lab. Arb.* 673, in 1964. *See Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry.*, 411 F.2d 320, at 322, n.1 (5th Cir. 1969). By sharply reducing BLF&E's active membership base, Award No. 282 motivated it to increase its efforts to enlist members from the most practicable source available to it, locomotive engineers.[7] As one authority predicted, the multisarious efforts to reduce the consist of train crews, including brakemen, indicated that the "continued contraction of employment opportunities" in the operating crafts "will serve to buttress that rivalry" for members among the unions representing the operating crafts. Levinson, *The Railway Labor Act—The Record of a Decade*, 3 Lab. L. J. 13, at 26-27 (Jan. 1962).

The reduction in the number of operating employees continues.[8] Firemen are virtually eliminated, and reduced

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7 During 1963 to 1966 alone, 18,000 or approximately half of the firemen were severed from employment. *See Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R.R.*, 385 F.2d 581, at 610 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 923 (1968).

8 Statement A-300 for the year 1986, published by the Bureau of Accounts of the Interstate Commerce Commission, shows slightly over 85,000 or 30.89% of the 276,000 employees on Class I railroads were employed in train and engine service. The ICC Form M-350 for October 1987 shows that about 79,000 or 31.6% of the approximate 249,500 railroad employees were engaged in train and engine service.

crews—in many instances two-person crews comprised of an engineer and trainman—are in place or being sought.[9] This trend obviously has virtually eliminated "intercraft mobility" and also has led railroads to turn to other sources for their engineers, which need, in the case of freight railroads, is generally satisfied from the ranks of trainmen.[10] Amtrak and the commuter railroads have obtained their locomotive engineers from Conrail, (*see* 45 U.S.C. §§ 588(a), 1113(a)), from the ranks of furloughed engine service employees (45 U.S.C. §§ 797b, 907, 1004) or, more recently, trainees from the street.

From the outset, Amtrak chose that there be no intercraft mobility and sought to eliminate conflict through a singular voice for each craft or class of employees.[11] Thus,

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9 *E.g.*, "C&NW asks for mediator in UTU talks on crew sizes," *Traffic World*, July 20, 1987, at 17-18; "Upcoming labor talks," *Traffic World*, February 1, 1988, at 9.

10 Article XIII of Mediation Agreement, NMB Case A-11471, dated October 31, 1985, between the railroads represented by the National Carriers' Conference Committee and the UTU reads in part:

> The craft or class of firemen (helpers) shall be eliminated through attrition except to the extent necessary to provide the source of supply for engineers and for designated passenger firemen, hostler and hostler helper positions. Trainmen shall become the source of supply for these positions as hereinafter provided.

This article also provides for engine service employees to establish brakemen's seniority and preferences to train service employees for selection as applicants for engine service. Amtrak is not a party to the National Agreements.

11 The freight railroads continue to have conflicts with the two organizations in matters of seniority, assignments, etc., and with the conflicting views of arbitrators. *Compare, e.g., Brotherhood of Locomotive Engineers v. Atchison, T.*

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Landers and the other Amtrak passenger engineers do not perform any service in, are not transferred to any other craft or class of service at Amtrak, and do not hold employment rights in any craft or class at Amtrak other than passenger engineer. Similarly, no employee in any craft represented by the UTU on Amtrak holds seniority or employment rights in the craft of passenger engineers. (Jt. App. 71, ¶ 7). However, on Amtrak, as on most railroads where BLE is bargaining representative, the union security clause embodies the literal, if not always exact, language contained in Section 2, Eleventh (c) of the RLA, 45 U.S.C. § 152, Eleventh (c). (Jt. App. 43-44; Pet. App. 40a-42a).

Relying upon his experience at Conrail (Jt. App. 76-77), Landers sought to have UTU represent him in company-level proceedings. Consistent with its application of the exclusive representation rules in effect on its property, Amtrak refused. Landers handled his complaint with Amtrak himself and then filed his action for relief seeking

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& S. F. Ry., 768 F.2d 914 (7th Cir. 1985) and *United Transportation Union and Burlington Northern R.R.*, Awards No. 1 and 2 of Public Law Board No. 3950, (April 14, 1986), the questions and findings of which are attached hereto as Appendix "A". In addition to the conflicts arising out of two unions attempting to speak for the same groups of employees, contrary to the view expressed at pages 12 and 30 of petitioner's brief, the right of the contract holder to interpret and apply agreements is illusory at best, for "the neutral referee is not bound by the interpretation placed upon the contractual provision by the union and company signatory to the collective bargaining agreement." (Jt. App. 82, ¶ 10). *See also, United Paperworkers Int'l Union v. Misco, Inc.*, — U.S. —, 108 S.Ct. 364, at 371 (1987) (courts not authorized to reconsider merits of award on basis that "the arbitrator misread the contract").

to set aside the exclusive grievance representation rules contained in the Amtrak-BLE collective bargaining agreement. (Jt. App. 8).

In a memorandum decision entered on June 24, 1986, the district court found that nothing in the facts of the case or in the RLA gave Landers an unqualified right to representation in company-level grievance and disciplinary proceedings by a union other than BLE as the bargaining representative and refused to hold the exclusive representation rule invalid. (Pet. App. 32a). In affirming this decision, the Court of Appeals found that the legislative history of the 1934 amendments to the RLA did not support Landers' contention that the Act "opens company-level grievance proceedings to participation by minority unions" (*id.*, 4a-5a); refused to interpret the various sections of the RLA relied upon by Landers "as implying an automatic right of elective (minority union) representation at company-level disciplinary hearings" (*id.* at 10a); rejected as distinguishable, inapposite or in conflict with prior well-reasoned authority and the legislative history of the 1934 RLA amendments, the decision of the Seventh Circuit in *McElroy v. Terminal Railroad Ass'n of St. Louis*, 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 1015 (1969), and the decision of the Fifth Circuit in *Taylor v. Missouri Pacific Railroad Co.*, 794 F.2d 1082 (5th Cir. 1986), *cert. denied*, — U.S. —, 104 S. Ct. 670, 93 L. Ed.2d 721 (1986) (Pet. App. 13a-15a); and further found that federal labor policy sanctions the legitimate interest of the collective bargaining representative in representing all members of the craft, thereby eliminating any opportunity for the employer to undermine the status of the accredited collective representative and, quoting from

this Court's opinion in *Republic Steel Co. v. Maddox*, 379 U.S. 650, 653 (1965), "complement[ing] the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract." (Pet. App. 9a-10a). Based upon this reasoning, the Court of Appeals for the First Circuit said:

> We conclude, as did the district court, that Landers' right to representation by the UTU at the company level was governed by the Agreement and thus by the "usual manner" of dispute resolution between Amtrak and its passenger engineers. The court's fact-based determination that the "usual manner" prevalent at this workplace did not involve representation by a union other than the "majority" union—the collective bargaining agent—was not clearly erroneous. And the Agreement—which, when construed in this fashion, prohibited the appellant from being assisted by the UTU at the February 1984 hearing—was not in derogation of any provision of the RLA. Landers need not join the BLE; but, unless and until the Agreement or the "usual manner" is changed, he and others similarly situated must forego representation by their own (minority) union at the initial stages of grievance and disciplinary proceedings.

Id., at 17a.

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SUMMARY OF ARGUMENT

Though alluding to the contentions he raised before the court below and were rejected by it, petitioner Landers at this time almost exclusively relies upon the argument that, in his view, Section 2, Eleventh (c) of the RLA, 45 U.S.C. § 2, Eleventh (c), permits operating employees to satisfy their union shop obligation by membership in either

BLE or UTU; that the Amtrak-BLE Agreement permits him to belong to UTU in conformity with that statutory provision; and that this right would be negated if he is required to handle grievances himself or through BLE. Neither the language of Section 2, Eleventh (c) nor its legislative history conveys any such entitlement. The 1951 union shop amendments were proposed for two purposes: to eliminate free riders who did not support the craft representative's performance of its functions under the RLA, *Int'l Assn of Machinists v. Street*, 367 U.S. 740, at 764 n. 15 (1961), and to stabilize labor relations in the railroad industry by making it more difficult to raid established units and by reducing turmoil and agitation among railroad employees. Hearings on H.R. 7789 Before Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess. 11, 22-23 (1950). Section 2, Eleventh (c) was added to the proposed union shop amendments for the very narrow purpose "to prevent compulsory unionism or the necessity of changing from one union to another when an employee temporarily changes crafts." *Pennsylvania Railroad Co. v. Rychlik*, 352 U.S. 480, 492-93 (1957). In light of the fact that there is no intercraft mobility on Amtrak, this problem is never reached. The alternative union membership provision is irrelevant to the resolution of this controversy. Moreover, reading Section 2, Eleventh (c) as permitting rival unions to process grievances and claims would be contrary to the federal labor policy by fostering minority unions, reducing the chances for labor tranquility, and decreasing the opportunities for orderly meeting the technological and functional changes in the railroad industry.

In fact, the language expressed in the RLA would mandate that the labor union designated the craft representative by the majority of the craft be deemed such for *all* purposes of the Act. *See* 45 U.S.C. §§ 152, Fourth and Ninth; *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515 (1937). The very purpose of the 1926 Act and the 1934 amendments to the RLA was to eliminate labor turmoil caused by instability among competing labor organizations and the fostering of company unions. Although an amendment was proposed to Section 2, Fourth, as submitted to the Congress in 1934, which amendment would have permitted an individual employee, or group of individuals involved in grievances "from having representatives to handle their grievances that are not representatives of the majority", that amendment was specifically rejected by Congress. Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 7650, H.R. 9689, and S.B. 266, 73rd Cong., 2d Sess. 1, at 89 (1934).

Based upon this rejection of a proposition similar to that advanced by petitioner, operating employees should be treated just as workers covered by the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, and nonoperating railroad employees relative to the bargaining representative's power to adjust grievances. Those employees do not have a right to bypass the craft representative and have a minority union handle their grievances. *See e.g., Medo Corp. v. Labor Board*, 321 U.S. 678 (1944); *Broady v. Illinois Central R.R.*, 191 F.2d 73 (7th Cir. 1951), *cert. denied*, 342 U.S. 897 (1951). Moreover, since the day-to-day administration of the contract is collective bargaining, the collective representative should have control of grievances to the exclusion of rival unions. *See, e.g., Conley v. Gibson*, 355 U.S. 41, 46 (1957); Summers, *Individ-*

ual Rights in Collective Agreements and Arbitration, 37 N.Y.U.L. Rev., 362, 391-92 (1962). The exclusive representation rule in the Amtrak-BLE agreement is consistent with the federal labor policy in such matters.

A comparison of Sections 3, First (i) and 3, First (j) establishes that Congress knew how to specifically prescribe when an employee may be represented "in person, by counsel, or by other representatives." Although an employee may use an attorney or any representative of his choosing before the NRAB, 45 U.S.C. § 153, First (j), or "the representative of any craft or class of employees of such carrier" before a Public Law Board pursuant to 45 U.S.C. § 153, Second, Section 3, First (i) states in regard to grievance handling at the carrier level that minor disputes "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes." The "usual manner" of handling minor disputes refers "to the usual manner in which disputes have been resolved by a particular carrier and its employees." (Pet. App. 29a). *See McElroy v. Terminal Railroad Ass'n of St. Louis*, 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 1015 (1969). On Amtrak, the "usual manner" historically has not included "the practice of representation of such employee by his own union." (Pet. App. 30a). Moreover, the ebb-and-flow between interrelated operating crafts, one of the main bases upon which *McElroy* relied in concluding that the engineers on the Terminal Railroad Association of St. Louis could be represented by the BLF&E as the representative of the craft of firemen, does not exist on Amtrak. The holding below is, therefore, consistent with *McElroy* and the Fifth Circuit's decision in *Taylor v. Missouri Pacific*

Railroad Co., 794 F.2d 1082 (5th Cir. 1986), *cert. denied*, — U.S. —, 104 S. Ct. 670, 93 L.Ed.2d 721 (1986), which followed the rationale in *McElroy*.

In sum, there is no foundation in law or in fact to justify a right for an Amtrak passenger engineer to have a minority union, UTU, or anyone other than the craft representative, represent that passenger engineer in the handling of grievances and disciplinary matters. Permitting enclaves of rival unions within the crafts of locomotive engineers and firemen (engine attendants) on Amtrak, the commuter railroads that came into being on January 1, 1983, and the regional or shortline railroads that are coming into existence throughout the nation can only lead to the labor unrest and instability in the railroad industry that the RLA and its amendments in 1934 and 1951 were intended to stifle.

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ARGUMENT

I. THE RAILWAY LABOR ACT PERMITS CONTRACTUAL PROVISIONS LIMITING REPRESENTATION AT COMPANY-LEVEL PROCEEDINGS TO THE CRAFT REPRESENTATIVE.

A. The Statutory Language Does Not Prohibit Exclusivity In Company-Level Grievance And Disciplinary Proceedings.

This case involves only the question of whom a railroad operating employee, more specifically, an Amtrak passenger engineer, may select to represent him in pro-

Due to the absence of specific statutory guidance on this point, in *Brooks v. Chicago, R. I. & P. R.R.*, 177 F.2d 385, at 391 (8th Cir. 1949), the Eighth Circuit stated:

> The Railway Labor Act does not empower the courts to enforce against railroads any prescribed procedure for investigating and discharging its employees. . . .

Subsequently, the Seventh Circuit expressed the same view in more detail:

> We can find no provision of the Railway Labor Act which gives to employees the right to a representative of their own choice at an investigation by company officials of a charge that the employee has violated company rules. . . .
>
> It appears to us under the above provisions of the Railway Labor Act that the employee's right to representation thereunder, when an investigation of a breach of company rules is involved, would arise only when the officials of the company have completed their inquiry and entered a finding unsatisfactory to the accused employee.

Broady v. Illinois Central R.R., 191 F.2d 73, at 76-77 (7th Cir. 1951), *cert. denied*, 342 U.S. 897 (1951).

Except for Section 3, First (j) of the RLA, 45 U.S.C. § 153, First (j), which explicitly states that the employee may be represented "in person, by counsel, or by other representatives", the clauses of the RLA refer to the designated representative and its duties. A labor union designated as the collective bargaining representative by the majority of the craft is deemed such "for the purposes of this Act." *See* 45 U.S.C. §§ 152, Fourth and Ninth. (Pet. App. 36a, 38a-39a). In fact, Section 2, Ninth mandates that upon notification of the organization's certifi-

ceedings which are contractually required prior to the time the dispute is referred to the NRAB under Section 3, First(i) of the RLA.[12] That section provides:

> The disputes between an employee . . . and a carrier . . . growing out of grievances or out of the interpretation or application of agreement concerning rates of pay, rules, or working conditions . . . *shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes* . . . (Emphasis supplied).

Significantly, Section 3, First (i) does not prescribe "the usual manner" in which disputes "shall be handled" at company-level proceedings on the railroad. Nor does that section make any provision with respect to representation of any individual employee in the course of the required "usual" handling.

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12 Such disputes also may be submitted for adjustment to special boards of adjustment or Public Law Boards under Section 3, Second of the RLA, 45 U.S.C. § 153, Second, "by the representative of any craft or class of employees of such carrier." So long as it holds representation rights on a carrier, a minority union—one with some members in a craft as to which it is not the representative—may invoke the P.L. Board procedures. *See General Committee of Adjustment, UTU-E* v. *Burlington Northern, Inc.*, 563 F.2d 1279 (8th Cir. 1977) *cert. denied*, 449 U.S. 826 (1980); *Brotherhood of Locomotive Engineers* v. *Denver & R.G.W. R.R.*, 411 F.2d 1115, 1118 (10th Cir. 1969) (The Tenth Circuit found that P.L. Boards may be invoked by the craft representative or an otherwise qualified union, but not the employee, his attorney or any other person.) *See also Simberland* v. *Long Island R.R.*, 421 F.2d 1219 (2d Cir. 1970). Thus, it has been assumed that either BLE or UTU could submit claims to P.L. Boards for any operating employee belonging to either union, but any union without representation in those crafts could not.

cation as majority representative by the National Mediation Board, the carrier "shall treat with the representative so certified as the representative of the craft or class for purposes of this Act."

One of the general purposes of the RLA identified in 45 U.S.C. § 151a(5) is "to provide for the prompt and orderly settlement of all disputes growing out of grievances." Moreover, one of the main purposes of the Act is to further collective bargaining, one way of which, as the lower courts found, is through the administration of the agreement reached by the carrier and the craft representative of the employees. (Pet. App. 8a-10a, 28a).

Congress drew a dramatic difference between the handling of grievances and disciplinary matters on the property and the proceedings before the NRAB. Those grievance and disciplinary disputes which fail to reach an adjustment in the course of being "handled in the usual manner up to and including the chief operating officer" may thereafter be referred to the NRAB as provided in Section 3, First (i). Unlike handling at the carrier level, Section 3, First (j) with respect to representation in proceedings at the NRAB permits the employee to represent himself, "by counsel or by other representatives." Clearly, this distinction shows that Congress was aware that only the craft representative could handle grievances on the property.[13] When the duties imposed upon "a

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[13] The lower courts found this distinction establishes that the RLA does not create a prohibition against exclusive representation provisions, even for the unions to which Section 2, Eleventh (c) would be applicable: "Congress obviously

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carrier or carriers and its or their employees" set forth in Sections 2, First and Second on the RLA, 45 U.S.C. §§ 152, First and Second, are read in light of the language employed in Section 3, First (i), it is apparent that the only requirements imposed by Congress with respect to the duty to make every reasonable effort to settle grievances and disputes in conference imposed in those sections are the *time* and *place* conditions for such conferences specified in Section 2, Sixth, 45 U.S.C. § 152, Sixth.

Even the statutory conditions for time and place cannot arise except in the absence of a provision in the labor contract between the carrier and the craft representative. In short, the matter of prendjustment board conferences for the settlement of these disputes was set for collective bargaining. This is made plain by the proviso to Section 2, Sixth fixing the time and place for conferences and reading "that nothing in this chapter shall be construed to supersede the provisions of any *agreement* [as to conferences] *then in effect between the parties.*" (Emphasis supplied). The italicized language shows that Congress intended the provisions of the current agreement between the carrier and craft representative should govern conferences on claims and grievances.

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knew how to employ language bestowing elective rights of representation upon workers, yet chose to do so only for hearings before the Board. * * * The fact that Congress eschewed conferment of a specific right of elective representation in § 153, First (i), directly preceding § 153, First (j), forcefully imports the absence of any intent to mandate such a rule at the company level." (Pet. App. 6a, 32a).

The statutory "usual manner" of handling as the courts below found and the parties agree, is determined by the collective bargaining agreement in place or the "manner in which disputes have been resolved by a particular carrier and its employees." (Pet. App. 12a, 29a).

B. The Legislative History Of The 1934 Amendments To The RLA Favors Exclusive Representation.

A study of the legislative history of the 1934 RLA establishes that those amendments were directed toward two problems, the carriers' refusal to recognize the employees' choice of representatives and their support of company unions. In short, the 1934 amendments sought to promote the employees' freedom of association and to protect that choice against abuses by carriers. *See Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, at 543 & n.2 (1937). Those amendments merely provided a vehicle to assure that management would not unduly reject the employee representative's authority and further prohibited outright the company supported union, as well as the so-called "yellow dog" contract, a pre-employment extraction of non-union or union choice. This appears in both the House and Senate Reports on the 1934 amendments. (H.R. Rep. No. 1944, 73rd Cong., 2d Sess., at 1, 2; S. Rep. No. 1065, 73rd Cong., 2d Sess, at 1,2). At page 2, the House Report succinctly states the problem as to free choice reflected in both the 1926 and the 1934 laws.

> 6. The Railway Labor Act of 1926, now in effect, provides that representatives of the employees, for the purpose of collective bargaining, shall be selected without interference, influence, or coercion by railway management, but it does not provide the machinery

> necessary to determine who are to be such representatives. These rights of the employees under the present act are denied by railway managements by their disputing the authority of the freely chosen representatives of the employees to represent them. A considerable number of railway managements maintain company unions, under the control of the officers of the carriers, and pay the salary of the employees' representatives, a practice that is clearly contrary to the purpose of the present Railway Labor Act, but it is difficult to prevent it because the act does not carry specific language in respect to that matter. This bill is designed to correct that defect.

In *Virginian Ry. v. System Federation, supra*, this Court held the basic command of the RLA is that the carrier shall meet and treat with the accredited representative and no other. *Id.*, at 547-48. And in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944), the Court concluded that a carrier may not enter into employment contracts with individual employees when under an obligation to bargain collectively.

There was no suggestion by Congress, either in 1926 or 1934, that it was addressing in any fashion whatever the matter of permitting employees to have a choice of union representatives for grievance handling after a collective bargaining representative is fairly chosen by the majority. If anything, the legislative history establishes that a proposal to that effect was submitted and rejected.

The second sentence of Section 2, Fourth as proposed in H.R. 9689, which bill contained the 1934 amendments, read: "The majority of any craft or class of employees shall have the right to determine who shall be the repre-

sentative of the craft or class for the purposes of this Act." In the hearings on the RLA before the House Committee on Interstate and Foreign Commerce, Commissioner Eastman, the draftsman of the 1934 amendments, was asked whether an individual or group of individuals could present their grievances directly to the management. In his response, Commissioner Eastman suggested a change in the aforementioned sentence, referring to language of the old Railroad Labor Board quoted in *Pennsylvania Railroad System and Allied Lines Federation No. 90 v. Pennsylvania R.R.*, 267 U.S. 203 (1925). The quotation indicated that under the old RLA union members had the right to present grievances by representatives of their choice. In Commissioner Eastman's view, "when it comes to presentation of grievances, . . . an individual employee ought not be stopped in any way from taking his grievance up directly with management, and I think that ought to apply to any other group of employees."[14] He, therefore, concluded:

> *I think some qualification should be contained in this act.* . . . I should like to work out an amendment which will cover that point. . . .

Id. (Emphasis supplied).

Subsequently, the Chairman of the Railway Labor Executives' Association and President of the Railway Clerks, George Harrison, testified that the majority representation features of the RLA should not prevent individuals involved in grievances "from having representatives to handle their grievances that are not representatives of the majority." *Id.*, 89. Therefore, Mr. Harrison, like Commissioner Eastman, stated:

> *We would like to offer an amendment to the language as it is written* . . . and that is designed to make it clear that the individual employee, or a group of individuals involved in grievances, are not prevented from having representatives to handle their grievances that are not representatives of the majority.
>
> So, we wish to insert . . . after the word "purposes", . . . the following: "Of making and revising agreements concerning rates of pay, rules, and working conditions." And strike out the words "of this act".
>
> Now, that makes it clear that the majority of any craft or class of employees shall have the right to designate who shall be the representative of the craft or class for the purpose of making and revising agreements . . . and leaves the balance of the act . . . with no inference that it shall not apply just as it reads, where the individual may in person or by counsel of his own choosing or other representative, prosecute his grievances.

Id. (Emphasis supplied).

The change proposed in Section 2, Fourth was not adopted, and the present section is almost verbatim from H.R. 9689.[15] In view of the fact that all concerned believed

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[14] Railway Labor Act Amendments: Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 7650 [predecessor of H.R. 9861], H.R. 9689, and S.B. 266 73d Cong., 2d Sess. 44 (May 22-25, 1934).

[15] The courts in *McElroy v. Terminal R.R. Ass'n of St. Louis*, 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 1015 (1969); *Taylor v. Missouri Pacific R.R.*, 794 F.2d 1082 (5th Cir. 1986), *cert. denied sub nom., United Transportation Union v. Taylor*, — U.S. —, 104 S. Ct. 670, 93 L.Ed.2d 721 (1986); and *Coar v. Metro-North Commuter R.R.*, 618 F. Supp. 380 (S.D. N.Y. 1985), improperly assumed or found that the Eastman-Harrison Proposal was accepted.

it necessary to modify the amendment to include minority representation, the defeat of the proposal leads to one conclusion—the RLA requires the majority representative to act for all purposes under the Act, not merely collective bargaining negotiations.

C. The Federal Labor Policy Supports The Disputed Contract Clause.

It is obvious that there is a continuing nature to collective bargaining; therefore, the primary purpose of the bargaining representative and the collective bargaining process does not begin and end with the formulation of the labor contract. Recognizing that contract administration through grievance disposition under the RLA is collective bargaining, this Court has said:

> Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other work rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract.

Conley v. Gibson, 355 U.S. 41, at 46 (1957).

Later, in referring to grievance handling under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, this Court remarked:

> Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees.

Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965). *See also*, Cox, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 HARV. L. REV. 1097, at 1100 (1950) ("Contract negotiations are the legislative process of collective bargaining; the day-to-day working out of plant problems is its administrative or judicial aspects.").

The significance of the disposition of individual grievances in the collective bargaining process is the sharing by two collective entities in the development of the law of the plant:

> . . . In the handling of grievances, as in the negotiation of the terms of an agreement, the interests of all employees are involved. The principal purpose of the grievance procedure is not to provide a framework within which individual desires and complaints can be taken up with the employer; rather, it is to provide a framework within which the employees may *bargain collectively* to determine how the general principles of the agreement are to be applied to day-to-day problems.
>
> The settlement of each grievance—whether voluntarily or by arbitration—establishes a precedent which will usually be followed in subsequent cases. (Emphasis in original).

Ostrofsky v. United Steelworkers, 171 F. Supp. 782, 793 (D. Md. 1959), *aff'd per curiam*, 273 F.2d 614 (4th Cir. 1960), *cert. denied*, 363 U.S. 849 (1960).

Most students of labor-management relations strongly advocate that the collective representative should have complete control of grievances.

> Through the prosecution of grievances it [the union which is the duly designated bargaining repre-

sentative] can daily demonstrate its effectiveness as guardian of the employee's interests; successful settlement builds bonds of loyalty from those benefited; and refusal to process underscores the union's authority. Conversely, grievances settled with individuals or other unions makes the majority union appear unnecessary, if not ineffective, and creates conflicting loyalties. More importantly, the union as representative of all of the employees has a collective interest in the individual's claim. If the claim is granted, it may be at the expense of other employees—seniority, promotion, and job assignment cases are only the most obvious examples. If the claim is denied, it may provide a precedent which casts a cloud over other employees' rights. The union has not only an interest but a responsibility to protect the other employees' right. In addition, it has a separable institutional interest that the bargain it has made not be remade or frittered away by individual action.

Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. Rev. 362, 391-92 (1962).

In sum, the ruling sought by Landers on behalf of UTU would further the latter's position as a rival union through the use of the grievance procedures, which would effectively undermine the BLE's "performance of its functions under the Act." *See Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 764, n. 15 (1961). Denying the majority representative power to control the presentation of grievances and thus to control the interpretation and application of the collective agreement offers dissident groups belonging to rival unions the opportunity to use grievance procedures as a vehicle for competition and a means to foster employee dissatisfaction instead of a method for eliminating it. Competition of this nature can deter the bargaining representation from taking responsible positions, for to do so could strengthen the rival union which could process all sorts of frivilous claims. The historical application of the RLA is evidence enough that any reading of its intricate procedures must avoid, not foster, disruptive conflict in labor relations. Exclusivity in collective bargaining representation and the stability derived therefrom have long been the cornerstones of the federal labor law and should be retained.

II. THE DECISION BELOW UPHOLDING THE "USUAL MANNER" OF GRIEVANCE HANDLING ON AMTRAK IS NOT IN CONFLICT WITH THE RULINGS OF OTHER COURTS.

The specific issue of representation in grievance handling has been visited on a number of occasions and, insofar as workers covered by the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, and nonoperating employees in the railroad industry, a right of free choice of a representative for company-level grievance presentation has not been offered.

As the *amici curiae*, American Federation of Labor and Congress of Industrial Unions and Railway Labor Executives' Association point out at page 6 of their brief to the Court, "In *Medo Corp. v. Labor Board*, 321 U.S. 678, the Court approved the NLRB's holding that an employer had violated § 8(a)(1) of the NLRA by bargaining over the terms of employees [sic] with a group of employees and ignoring their representative," and has adhered to its holdings as to the extent of the bargaining representative's power to adjust grievances and the individual employee's role in that process following the revision of the language of the proviso to § 9(a) of the NLRA which permits individual employees to present

grievances to their employer. In *Hughes Tool Company v. NLRB*, 147 F.2d 69 (5th Cir. 1945), that court rejected the claim that employees have a right to bypass the craft representative and have a minority union handle their grievances, because they may have a right to present their own grievances. *See also Broniman v. A. & P. Tea Co.*, 353 F.2d 559 (6th Cir. 1965), *cert. denied*, 384 U.S. 907 (1966); *Black-Clawson Co. v. Int'l Ass'n of Machinists*, 313 F.2d 179 (2d Cir. 1962). *But see Douds v. Local 1250, Retail, Wholesale Department Store Union*, 173 F.2d 764, 772 (2d Cir. 1949), which has been severely criticized. *See, e.g. Sherman, The Individual and His Grievance—Whose Grievance Is It?* 11 U. PITT. L. REV. 35, at 38, 55 (1949).

Until the decision in *McElroy v. Terminal R.R. Ass'n of St. Louis* ("McElroy"), 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 1015 (1969), the RLA cases reached conclusions consistent with the NLRB holdings that the right to present grievances at the company level is vested only in the employee and the statutory representative.[16]

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[16] In *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711 (1945), the Court held that the designated collective bargaining agent cannot exclude the individual employee from active participation in hearings before the carrier's officers involving the adjustment of an employee's claim, and that the representative's authority, derived solely from the RLA, does not authorize the settlement by it of an individual's claim. The employees in *Burley* neither sought nor were denied the right personally to present their claims or to present them by other than the designated representative of the craft. Notwithstanding the very precise nature of the Court's ruling, then Attorney General Tom C. Clark advised the President, in response to a request for an opinion from the National Mediation Board, that the RLA allows a railroad employee to prosecute his grievance personally or through any representative he may designate. 40 *Op. A. G.* 494 (1946).

In *Broady v. Illinois Central R.R.*, 191 F.2d 73 (7th Cir. 1951), *cert. denied*, 342 U.S. 897 (1951), a dining car employee appeared at the investigation with his representative, two officers of a union which was a rival of the duly designated representative. The railroad refused to permit them to participate in the investigation due to the provisions of the collective bargaining agreement which limited the choice of representatives. The Seventh Circuit denied the employee's claim that his discharge was wrongful because the refusal to allow him to be heard by a representative of his own choosing violated his rights under the RLA and the Fifth Amendment to the Constitution of the United States, and found "no provision of the Railway Labor Act which gives to employees the right to a representative of their own choice at an investigation by company officials." *Id.*, 76. In *Butler v. Thompson*, 192 F.2d 831 (8th Cir. 1951), the court affirmed the dismissal of a complaint for reinstatement and for loss of earnings based on the claim that the employee in a non-operating craft had been denied the hearing required by the labor contract, when no hearing was held because the carrier investigating officer refused to permit the employee to be represented by an officer of a rival union. *See also Edwards v. St. Louis S.F. R.R.*, 361 F.2d 946, 954 (7th Cir. 1966); *Brooks v. Chicago, R.I. & P. R.R.*, 177 F.2d 385, 391 (8th Cir. 1949). Similarly, in *D'Elia v. New York, N. H. & H. R.R.*, 230 F. Supp. 912 (D. Conn. 1964), *aff'd.* 338 F.2d 701 (2d Cir. 1964), *cert. denied*, 380 U.S. 978 (1965), the court held that it did not have jurisdiction to review a NRAB award upholding a discharge, when the employee had been denied representation through an attorney at the investigation hearing, or to set aside the award for

alleged deprivation of constitutional rights where he, in fact, had been represented by the general chairman for the craft representative. *See United R.R. Workers v. Atchison, T. & S. F. Ry.*, 89 F. Supp. 666 (N.D. Ill. 1950). In *D'Amico v. Pennsylvania R.R.*, 191 F. Supp. 160 (S.D. N.Y. 1961), the court refused to enjoin a railroad from conducting certain disciplinary proceedings on the ground that the contract provided that the employee could only be represented at company-level proceedings by a duly accredited union representative. Also, an assertion that a clause providing for exclusive representation at company proceedings violates the RLA was rejected with the notation that Section 3, First (i) "indicates strongly that the 'usual manner' would be determined by a contract between the carrier and the chosen bargaining agent of the employees and could be limited as provided in the bargaining agreement in the case at bar. . . ." *Switchmen's Union v. Louisville & N. R.R.*, 130 F. Supp. 220, at 227 (W.D. Ken. 1955).

However, the Seventh Circuit in *McElroy* distinguished the above cases on the basis that they did not involve railroad operating employees with intercraft mobility, or were not situations where employees shuttle back-and-forth between crafts represented by different unions, or where the requested representation is by a union to which the employee belongs and which is collective bargaining representative for a craft in which the employee holds seniority rights and does work from time to time. And, as previously pointed out, the *McElroy* court read the isolated excerpts from the legislative history of the RLA as if the amendment to Section 2, Fourth had been enacted when, in fact, it was defeated. Based upon the

reasoning that it had been presented with "the unique situation . . . where employees shuttle back and forth between their crafts," *McElroy* decided that a collective bargaining agreement that had been negotiated between a railroad and the BLE did not bar a group of locomotive engineers from having the union representing locomotive firemen on that railroad, and in which they held membership, process their grievances. *Id.*, 971. Moreover, the court in *McElroy* found that the railroad historically had permitted minority union representation in respect to company-level grievance and disciplinary problems, and that this had become the "usual manner" of handling as provided by Section 3, First (i) of the RLA. *Id.*, 968, 969.

Here, that situation does not pertain. No Amtrak passenger engineer performs temporary services in a craft represented by UTU, and none shuttle back-and-forth between any craft represented by BLE and any craft represented by UTU. No employee in any craft represented by UTU on Amtrak holds seniority or promotion and employment rights in the crafts of passenger engineers or firemen (engine attendants) represented by BLE on Amtrak. (Jt. App. 71, ¶ 7).

The situation in *McElroy* differs also in several aspects from the "usual manner" of handling on Amtrak. In *McElroy*, there had been a history of minority union representation in the operating crafts, which the carrier and BLE attempted to change by writing an exclusive representation provision. Until Amtrak assumed the intercity passenger service in the Northeast Corridor on January 1, 1983, it did not employ anyone in the crafts of oper-

ating employees represented by BLE and UTU. At all times since Amtrak commenced that service with its own employees, BLE has been the exclusive representative for the craft of passenger engineers; its collective bargaining agreement with Amtrak has precluded all other unions and persons, such as attorneys, from handling grievances under that agreement; and Amtrak has consistently applied that agreement (and its agreements with other craft representatives) to restrict representation to the accredited representatives.

More recently, in *Taylor v. Missouri Pacific R.R.*, 794 F.2d 1082 (5th Cir. 1986), *cert. denied*, — U.S. —, 104 S. Ct. 670, 96 L. Ed.2d 721 (1986), the Fifth Circuit held that switchmen members of BLE, who had promotion and employment rights in the craft of locomotive engineers, could select BLE as their grievance representative even though UTU is bargaining representative for the craft of switchmen. That court followed *McElroy* and relied upon Section 2, Eleventh (c), the alternative union shop provision for operating employees, to support its ruling. To the extent that *Taylor* was decided on the unique situation within the operating crafts on freight railroads and the manner of grievance handling in that situation, it is consistent with *McElroy*, not in conflict with the decision below and other decisions denying minority union representation, and appropriate. To the extent *Taylor* may have relied upon the alternative union shop provisions of the RLA, it is improper as we show in the following section. *See also Carr v. Metro-North R.R.*, 618 F. Supp. 380, 383 (S.D. N.Y. 1985) (trial pending), which held BLE's exclusive representation rule on a commuter railroad that commenced operations on same day as Amtrak violated

the RLA, because membership in UTU would be meaningless otherwise. To the extent, the three cases depend upon a reading of the statutory language of the RLA and its legislative history and the application of federal labor policy which would permit rival and minority unions to participate in the collective bargaining process, including the administration of the labor contract at the company level, they simply are wrong. A minority union can act to disrupt labor relations with the carrier—it has nothing to lose—and can act in derogation of the interests of the majority, merely to serve the purposes of a small group to which it may owe some loyalty. On the other hand, contrary to Landers' suggestion (Brief, p. 23), UTU, as a minority union, owes no duty of fair representation to any individual employee. *Wells v. Order of Ry. Conductors and Brakemen*, 442 F.2d 1176 (7th Cir. 1971). In order to maintain its certification, however, the majority union has a broader interest to represent—an interest that is more germane to the purposes for which the RLA was enacted. The individual, like Landers, however, need not suffer. He may adjust his claims and grievances himself or through the craft representative, always subject to its duty of fair representation to all members of the craft, even though they are not members of the BLE. *Steele v. Louisville & N. R.R.*, 323 U.S. 192 (1944). The carrier obtains uniform application of the bargaining agreement. The public gains by a chance for industrial peace. The only loser is the minority union which thrives on the unrest it may be able to cause by participation in grievance handling.

III. THE NARROW PURPOSE OF SECTION 2, ELEVENTH (c), 45 U.S.C. § 152, ELEVENTH (c), BEARS NO RELATION TO EXCLUSIVE GRIEVANCE HANDLING BY THE CRAFT REPRESENTATIVE.

A. The Union Shop Amendments To The RLA Were Designed Solely To Authorize Agreements Compelling All Employees Receiving The Benefits Of The Collective Bargaining Agreement To Contribute To The Support Of The Union Negotiating And Enforcing That Agreement.

As the Court of Appeals noted, reliance upon Section 2, Eleventh (c) "as the source of a perceived right to allow a worker to choose his own union to represent him" is mislaid, and "[t]his is especially so when one considers the extremely narrow purposes intended to be served by the statutory provision." (Pet. App. 14a).

In passing Section 2, Eleventh of the RLA in 1951 (45 U.S.C. 152, Eleventh, 64 Stat. 1238), Congress lifted the prohibition against union shop agreements which had been inserted in the Act of 1934 (§ 2, Fourth and Fifth, 48 Stat. 1186). Section 2, Eleventh (a) of the Railway Labor Act specifically authorizes union shop agreements, also known as union security agreements, only where made by a "labor organization representing their craft or class."[17]

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[17] Section 2, Eleventh (a) provides: "Notwithstanding any other provisions of this Act * * *, any carriers or labor organizations * * * shall be permitted (a) to make agreements requiring as a condition of continued employment, that within sixty (60) days * * * all employees shall become members of the labor organization *representing their craft or class* * * *." (Emphasis supplied). (See Pet. App. 13a for full text).

The purpose of this provision is to allow the parties by agreement to compel "financial support of the *collective-bargaining agency* by all who receive the benefit of *its* work . . . ." *Railway Employees Department v. Hanson*, 351 U.S. 225, at 238 (1956). (Emphasis supplied).

The legislative history is clear that the amendments permit the union shop solely "to force employees to share the costs of negotiating and administering collective agreements, and the cost of the adjustment and settlement of disputes" and that the only financial support which may be required is that which directly "relates . . . to the work of the union in the realm of collective bargaining." *International Association of Machinists v. Street*, 367 U.S. 740, at 763-64 (1961).

The amendments were not addressed to the benefit of unions generally or even those railroad unions entitled to elect representatives to the National Railroad Adjustment Board. As the Court stated in *Machinists v. Street*, *supra*, 367 U.S. at 764, n. 15:

> [T]he primary union and congressional concern was with the elimination of the "free rider" who did not support *his* representative's performance of *its* functions under the Act. (Emphasis supplied).

Sponsors of the union shop bill also urged its enactment to stabilize labor relations in the industry by making it more difficult for another railroad union to raid an established unit, and to reduce "turmoil" and "agitation"

on union matters among railroad employees.[18] As the Court discerned, no part of the union shop amendments was intended to assist "dissident * * * unions [to] recruit new members." *Pennsylvania Railroad Co. v. Rychlik*, 352 U.S. 480, at 489 (1957). In this regard, UTU is a professed rival of the BLE for bargaining rights of passenger engineers and firemen on Amtrak.

Just as Sections 2, Second and Fourth should not be read to permit minority union enclaves which could disrupt labor relations on a particular railroad, Section 2, Eleventh (*c*) should not be read to encourage employees to join a minority union, not only to avoid paying a full share of the costs of collective bargaining, but also to undermine the "representative's performance of its functions under the Act." *See Machinists v. Street, supra*, 367 U.S. at 764, n. 15. Any statutory requirement, that the majority union in the operating crafts at least must, as the price for a union shop contract, subsidize its rival's organizational

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[18] Railroad labor spokesman George Harrison, whose statement to the committees in support of the amendment has been deemed authoritative by the Court (367 U.S. at 761-62), argued this point repeatedly: "The union shop makes it more difficult for one union to raid another, and thus eliminates or reduces weeks and months of turmoil among employees. * * * When your unions operate on a voluntary basis of attracting members, the union is continually on the job agitating for more. In other words, you have got to be militant all the time for people to understand that you are out fighting for their interest. * * * Many times you are forced to handle insignificant violations of your contract because a bunch of your members tell you that they are going to quit paying dues if you do not, and you process a lot of nuisance claims. * * * You will get rid of all of that if you have a union shop." Hearings on H.R. 7789 Before Committee on Interstate and Foreign Commerce ("House Hearings"), 81st Cong., 2d Sess. 11, 22-23 (1950).

efforts through the alternative membership provision[19] and also permit it to intervene in the process of administering that agreement, defeats the purposes of the 1934 Act and fractures every concern that convinced Congress to enact the 1951 union shop amendments.

B. The Sole Purpose Of The Alternative Union Membership Provision Is To Prevent Compulsory Dual Union Membership On Carriers Having Intercraft Transfers.

In *Felter v. Southern Pacific Co.*, 359 U.S. 326 (1959), the Court held that a dues checkoff procedure that made it difficult for an employee to transfer from one union to another violates Section 2, Eleventh (b) by eroding the freedom expressly reserved for decision of the individual employee to revoke dues assignments. Citing the reference in that opinion to "the area that the Act leaves open for solicitation by rival organizations—as where no union shop has been established, or within the area which even a union-shop arrangement can change affiliations," Landers suggests that the alternative union membership provision contained in Section 2, Eleventh (c) must be read as also permitting an employee to be represented by one of those unions.

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[19] "Employees would be tempted to desert the organization of the bargaining representative which was assuming its responsibilities under the Act in favor of another union which was not * * * and which could thereby offer cheaper dues. This would defeat the very purpose of the union [shop] amendments which is to compel each employee to contribute his part to the bargaining representative's activities on his behalf including its participation in the administrative machinery of the Act." *Machinists v. Street, supra*, at 764, n. 15.

This case may be distinguished from *Felter*, because the contractual regulation of grievance handling at the carrier level is not violative of any expressed statutory right of the employee, unlike the specific statutory right to revoke a checkoff assignment given the employee in Section 2, Eleventh (b). Also unlike the obvious intention of Congress "to deny carriers and labor organizations authority to reach terms which would restrict the employee's complete freedom to revoke an assignment by a writing directed to the employer after one year" *(id.*, at 333), no intention was ever expressed that the freedom of any operating employee shuttling back and forth between crafts to satisfy union shop provisions by membership in either the representative of the craft in which he is working or in the craft into which he is temporarily transferred would eliminate the collective voice of the members of the craft in bargaining decisions arising out of the administration of the applicable labor contract. Any deviation from the statutory language set forth in Sections 2, Fourth and 3, First (i) would erode the collective strength in bargaining in the name of augmenting the employee's transient right to alternative membership through a procedure permitting the rival union to present grievances to the carrier without the presence of the bargaining representative. That situation is far different from the situation mentioned in passing by the Court in *Felter*, where the employee desires to revoke a dues checkoff in order to change union affiliation resulting from a change in work assignments.

Moreover, this Court has already held that the "disarmingly clear" language of Section 2, Eleventh (c), unlike that in Section 2, Eleventh (b), cannot be applied literally but must be limited in its scope by construction

"in light of the policies [it] was intended to serve." *Pennsylvania Railroad Co. v. Rychlik, supra*, 352 U.S. at 488.[20] In *Rychlik*, an employee was discharged under a union shop provision drafted in the language of the statute after he resigned his membership in the union representing the craft and joined a newly organized union. In sustaining the discharge, this Court construed the RLA to permit alternative union membership only in certain very narrow circumstances and, even then, only in the organizations having an elector on the First Division of the NRAB.

After a dispositive analysis of the legislative history of the union shop amendments, the Court concluded that Congress enacted Section 2, Eleventh (c) solely to apply in a situation peculiar to the operating service on the railroads, namely, to those employees who temporarily "shuttle back and forth" between crafts represented by different labor organizations. While this high degree of job mobility posed no serious difficulty when union mem-

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[20] "At first glance the language of Section 2, Eleventh (c) would appear to be disarmingly clear: union-shop contracts are satisfied if the employee belongs to any union which happens to be national in scope and organized in accordance with the Act. * * * However, as so often happens, when the language of the statute is read, not in a vacuum, but in the light of the policies this Section was intended to serve, it becomes clear that the purpose of Congress was not, as respondent contends, to give employees in the railroad industry any blanket right to join unions other than the authorized bargaining representative, or to help dissident or rising new unions recruit new members. Rather the sole aim of the provisions was to protect employees from the requirement of dual unionism in an industry with high job mobility, and thus to confer on qualified craft unions the right to assure members employment security, even *if the member should be working temporarily in a craft for which another union is the bargaining representative.*" *Id.*, at 488-89. (Emphasis supplied).

bership was voluntary, the union shop amendments, as originally proposed, would have created a severe problem for some operating employees.[21] The solution was to provide that the union's security provisions covering the craft to which a member was temporarily transferred could be satisfied during his temporary stay therein by alternative membership in the union which represented the craft in which he was regularly assigned.

The holding of the Court in *Rychlik* on this point is strong and unequivocal:

> It thus becomes clear that the only purpose of Section 2, Eleventh (c) was a *very narrow* one: to prevent compulsory *dual unionism* or the necessity of changing from one union to another when an employee temporarily changes crafts. The aim of this Section, which was drafted by the established unions themselves, quite evidently was not to benefit rising new unions by permitting them to recruit members among employees who are represented by another labor organization. *Nor was it intended to provide employees with a general right to join unions other than the designated bargaining representative of their craft, except to meet the narrow problem of intercraft mobility.*

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21 The Committee Bill simply permitted union shop agreements compelling membership in the union representing the craft or class in which the worker was employed. "Under the ordinary union-shop contract, such a change from craft to craft, even though temporary, would mean that the employee would either have to belong to two unions—one representing each of his crafts—or would have to shuttle between unions as he shuttles between jobs. The former alternative would, of course, be expensive and sometimes impossible, while the latter would be complicated and might mean loss of seniority and union benefits." *Pennsylvania Railroad Co. v. Rychlik, supra,* 352 U.S. at 490.

Pennsylvania Railroad Co. v. Rychlik, supra, 352 U.S. at 492-93. (Emphasis supplied).

No blanket "union shopping" rights were conferred, and there was no intent "to allow employees to choose between unions" (352 U.S. at 492, n. 29). As the Court subsequently stated (352 U.S. at 494):

> In other words, once a union has lawfully established itself for a period of time as the authorized bargaining representative of the employees under a union-shop contract, Congress [conferred no] "right" of employees to choose between membership in it and another competing union. If Congress intended to confer such right, it would scarcely have denied the right to nonoperating employees of the railroads or industrial employees under the National Labor Relations Act. The purpose of Section 2, Eleventh (c) was simply to solve the problem of intercraft mobility under railroad union-shop contracts.

Despite the definitive analysis of the legislative history of Section 2, Eleventh provided by this Court in *Rychlik* and *Machinists v. Street,* 367 U.S. 740, petitioner contends that Congress intended by that section to foster a practice of substantial minority groupings in the operating crafts. In sum, based upon petitioner's view that Section 2, Eleventh (c) provides an unqualified choice in selecting the union to which he desires to belong—an observation which we submit is in error—he claims that he may be represented in grievance handling by anyone of his choice. An analysis of the legislative history of the provision demonstrates the error in this regard.

The initial bills considered by both the Senate and House Committees contained no alternative union mem-

bership provisions of any kind and were intended to wipe out minority union enclaves in their entirety.[22] The original bills authorized agreements compelling all employees, without exception, to belong to "the labor organization representing the craft or class", unless the union refused admission "because of membership in any other labor organization."[23] These bills had the support of the Railway Labor Executives' Association representing virtually all the "standard" railway unions, including SUNA, ORC&B and BLF&E. BRT and BLE opposed the bill.

It was a proposal by the Brotherhood of Railroad Trainmen that first raised the intercraft transfer issue in relation to employees in the operating crafts and first presented a solution to the problem based upon granting the employee a choice of membership in either the craft representative of the craft in which he was performing work or the craft representative of the craft in which he held employment rights. At first, the House Committee concluded that any amendment concerning the narrow problem of intercraft mobility in the operating crafts was unnecessary and stated in its report:

> During Committee consideration of the bill, questions were raised as to the status of employees who are temporarily promoted or demoted from one closely related craft or class to another. While, under the authority granted by the bill, no single agreement could require membership in more than one union, it was contended that as a practical matter this result might follow from two or more agreements between carriers and labor organizations, and, furthermore, that some employees might, in order to retain certain union benefits, feel obliged to be members of more than one union. The Committee decided that these questions should be resolved by negotiation and collective bargaining.[24]

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22 House Hearings at 10-11, 37, 249 (1950).

23 Hearings Before a Subcommittee of the Senate Committee on Labor and Public Welfare on S. 3975, 81st Cong., 2d Sess. 1; House Hearings, 1.

Later on the floor of the Senate, the Committee offered a proviso to its bill[25] dealing with the intercraft temporary transfer problem and providing simply that "no such [union shop] agreement shall require membership in more than one labor organization."[26] Senator Hill, floor manager of the bill, explained its purpose as follows:

> This proviso was attached because some question was raised as to the status, under this bill, of employees who are temporarily promoted or demoted from one closely related craft or class to another. This practice, with minor exceptions, occurs only among the train and engine service employees. Thus, a fireman may be promoted to a position as engineer for a short time and then due to a reduction in force be returned to his former position as fireman. It is the intention of this proviso to assure that in the case of such promotion or demotion, as the case may be, the employee involved shall not be deprived of his employment because of his failure or refusal to join the union representing the craft or class in which he is located if he retains his membership in the union representing

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24 H.R. Rep. No. 2811, Committee on Interstate and Foreign Commerce on H.R. 7789, 81st Cong., 2d Sess. (1950).

25 S. Rep. No. 2262, Committee on Labor and Public Welfare on S. 3925, 81st Cong. 2d Sess. (1950).

26 96 Cong. Rec. 15735-15736 (Senate 1950).

the craft or class from which he has been transferred.[27]

It is apparent from the legislative history of the bill that Congress did not outwardly reject the BRT's proposal but narrowed it.[28] At the outset, Congress began with a strict union shop provision which limited membership to the union representing the craft or class in which the employee was working. The proviso was not intended to circumscribe this basic principle. The proviso was not

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27 96 Cong. Rec. 15736 (Senate 1950).

28 Two courts of appeals, however, determined that Section 2, Eleventh (c) confers a right upon an operating employee, covered by a union shop agreement requiring membership in a union certified as the exclusive representative of *all* of the carrier's operating employees of interrelated crafts, to satisfy the membership requirement therein by joining and belonging to one of the qualified electors on the First Division of the NRAB notwithstanding the fact that that union is not an authorized representative of any of the carrier's employees. *Birkholz* v. *Dirks*, 391 F.2d 289 (7th Cir. 1968), *vacated and remanded with instructions to dismiss as moot*, 395 U.S. 210 (1969); *O'Connell* v. *Erie Lackawanna R.R.*, 391 F.2d 156 (2d Cir. 1968), *vacated and remanded with instructions to dismiss as moot*, 395 U.S. 210 (1969). *But see Rohrer* v. *Conemaugh & Black Lick R.R.*, 359 F.2d 127 (3d Cir. 1966), upholding union shop without alternative membership provision when bargaining agent represented *all* operating employees on railroad. Although the court in *O'Connell* v. *Erie Lackawanna R.R.*, *supra*, 391 F.2d at 160, emphasizing the last clause of the proposal which referred to "the duly designated or recognized craft or class representative of any one of them", found contrary to all other indications that Congress did not intend to restrict membership to the craft representatives, a stronger argument suggests the legislative body by use of that language had rejected the preceding proposal which would have left the choice of organization to the employee beyond the confrontation caused by the temporary transfer or shuttling situation. See *Pennsylvania Railroad Co* v. *Rychlik*, *supra* at 492, n. 29.

inserted to provide the employee with an unlimited choice of unions for membership or to allow him this choice in every given instance. However, the language of the BRT proposal would have provided the employee with an unlimited choice of membership between the bargaining representatives of any craft in which he held employment or in which he held promotion rights, regardless of his employment status at any given time. Thus, under its proposal, if a trainman represented by the BRT was subsequently promoted and regularly assigned to the craft of conductors represented by the ORC&B on that carrier, he could satisfy the membership requirement of the latter's union shop agreement by continuing to maintain his membership in the former organization, even if he had been a conductor for one, two, five or twenty years.[29] Said proposal completely vitiated the basic premise of the draftsmen of the bill. That Congress did intend, however, to provide certain employees, under limited circum-

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29 Citing certain references to the interpretation of BLE's national legislative representative [96 Cong. Rec. 17052 (1951)], the court in *O'Connell* v. *Erie Lackawanna*, *supra* at 161, said this is exactly what Section 2, Eleventh (c) was intended to do. Actually, it would appear that he was viewing the provision as including a strict union shop except in the shuttling back and forth situation. In 1950, there were more firemen than engineers, and the firemen would be in that status for many years (5 to 10) before promotion. Even after promotion to engineer, the individual employee would be often assigned as a fireman for a long period of years. However, BLE could not tap the first source at all, and, under the circumstances, most junior "engineers" could and would conceivably retain membership in BLF&E. At that time, BLE stood in the worst position; and one of its representatives therefore opposed the ultimately enacted bill. It is submitted that BLE's position in 1950 sustains the interpretation urged herein rather than detracting therefrom.

stances, an opportunity of alternative membership in line with the BRT's recommendation is clear. But this opportunity was restrictively conditioned to conform to the original and more traditional approach of requiring membership in the union representing the bargaining unit.[30]

In sum, the sole aim of the proviso was to insure that no employee in a transitory stage of employment should be required to belong to two unions to insure protection of his employment rights as he shuttles back and forth between two crafts represented by different unions with union shop agreements. *Rohrer v. Conemaugh & Black Lick R.R.*, 359 F.2d 127 (3rd Cir. 1966).

Later, the Brotherhoods for the operating crafts, excluding BLE, agreed upon a substitute amendment, offered by the floor manager of the bill, which substitute became Section 2, Eleventh (c). In explaining the substitute amendment, Senator Hill stated that its purpose was identical to that of the earlier Committee amendment—no employee in any of the operating crafts of a railroad should be required to belong to more than one labor organiztion as a result of a temporary promotion or transfer—[31] and this Court has held accordingly.[32]

It is obvious from the foregoing that Congress did not intend to preserve minority union enclaves in the bargain-

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[30] In fact, the "right" of alternative membership in satisfaction of a union shop agreement is so restrictive in the view of this Court that it is not considered a "choice" by the employee. *Pennsylvania Railroad Co. v. Rychlik, supra* at 492.

[31] 96 Cong. Rec. 16261, 16328-16330 (Senate 1950)

[32] *Pennsylvania Railroad Co. v. Rychlik, supra* at 492-94.

ing unit. Moreover, as has been shown, this Court has analyzed the legislative history of the union shop amendments at length on two separate occasions and concluded that Congress did not intend to confer "union shopping" rights, nor did it desire to assist dissident unions in recruiting and retaining members. Thus, any contention that Congress, in effect, not only conferred a right on the employee to satisfy his union shop commitment by belonging to a union that does not hold any bargaining rights for any employees in interrelated operating crafts, but also conferred a right on the employee to have a minority union (or anyone other than the craft representative, including an attorney) represent him in grievance handling, is entirely unsupported by any authority.

As previously established, one of the two purposes of both the 1934 amendments to the RLA and Section 2, Eleventh was to reduce turmoil and strife among the employees within a craft by preventing raiding by minority unions and by strengthening the collective bargaining position of the representative of that craft. If one were to accept petitioner's position, however, it would have to be on the basis that the intendment of Sections 2, Third, Fourth and Eleventh (c) was to foster minority unions in a craft represented by the bargaining agent chosen by a majority of the employees.

Any merit to this approach as to the past practices on freight railroads should now be rejected as leading to the proliferation of minority unions within the craft units for passenger engineers and firemen (engine attendants) on Amtrak and the commuter railroads that came into being on January 1, 1983, and the craft of locomotive

engineers on the new railroads springing up across the nation as a result of deregulation. Moreover, this approach has always lacked value by fomenting labor trouble, promoting ineffective bargaining, and potentially decreasing the opportunities for orderly and appropriate adjustment to the technological and functional changes presently occurring in the railroad industry.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

Awards No. 1 and 2

PUBLIC LAW BOARD NO. 3950

Parties: United Transportation Union

and

Burlington Northern Railroad Co.

Questions In Issue:

Question No. 1 (Revised)

"(a) When a fireman fails promotion on his first attempt and then successfully passes promotion on his second attempt, is the Carrier properly applying the provisions of Article 2, Section (E) of NMB Case No. A 9152 dated July 19, 1972, as amended (Training Agreement) Item No. 4 of the Implementing Agreement No. 4 between the Burlington Northern and United Transportation Union—E dated April 29, 1975 and Letter of Agreement dated September 13, 1976 in establishing those firemen's seniority date and standing, on the engineers' consolidated seniority district rosters?"

(b) When the Carrier hires a fireman with experience from another railroad or seniority district, then places that fireman in an abbreviated Training Program, paying him the engineer's rate of pay until he successfully passes his qualification for service as an engineer on the territory for which he was hired, is the Carrier properly applying the provisions of Article 2, Section (E) of NMB Case No. A 9152 dated July 19, 1972, as amended (training Agreement). Item No. 4 of the Implementing Agreement No. 4 between the United Transportation Union—E and the Burlington Northern dated April 29, 1975 and Letter of Agreement dated

September 13, 1976 and Letter of Understanding dated January 30, 1973 in establishing those firemen seniority date and standing on the engineers' consolidated seniority district rosters?"

Question No. 2

"Is the Carrier properly applying the provisions of Article II, Section (E) of NMB Case No. A 9152 dated July 19, 1972, as amended, Section 4 of Attachment 'B' pursuant to Article I of the Implementing Agreement No. 1 between BNI and UTU-E dated January 15, 1968, as amended March 2, 1970, Letter of Agreement dated December 12, 1972, and Memorandum of Agreement dated October 25, 1978, between BNI and BLE?"

• • •

(Pages 2 through 29 omitted)

Findings:

While we find this to be a convoluted dispute with several facets, and a dispute which the parties have vigorously prosecuted, presenting extensive Submissions, Rebuttal Statements and numerous exhibits, (the case record weighs more than 13 lbs.) nevertheless, there is one cardinal issue upon which this complicated case devolves. It is whether the UTU 1972 National Training Agreement and the Manning Agreement take precedence and are paramount to the Agreements negotiated between the BLE and the Carrier. It is the paramountcy of the 1972 UTU National Agreements and cognate agreements that will determine whether the Carrier can properly hire engineers from the outside; whether the Carrier has properly fixed and ranked the firemen in relation to the engineers on the engineers' rosters in consolidated seniority districts, and

whether the Carrier has properly applied the rules and Implementing Agreements relating to the seniority dates of firemen when engineers were promoted or hired from the outside. These are issues that are the subject matter of the several Questions that have been posed to the Board.

The Board is constrained to state that the Findings in this case have been predicated on the agreements negotiated on this property by the parties in interest. The Board has found that the numerous agreements cited by the UTU made on other properties are not controlling in the instant dispute.

The Board finds, after its analysis and review of the copious record of this case, that the positions advanced by the BLE and the Carrier are sounder and more correct than the position put forth by the UTU. We reach this basic conclusion because we find that the UTU National Agreement applies to, and was intended to apply, to employees already employed as, or hired as, firemen to be trained and qualified for promotion to the craft of locomotive engineers. We find that the UTU National Agreements had no application to employees who were already qualified bona fide engineers, either hired from other properties, or transferred from other zones or seniority districts. These employees were not of such a class that they were eligible to be promoted to engineers since they already occupied such a status.

The Board finds that the rationale underlying the UTU 1972 National Training Agreement was to create or establish a viable supply or source of engineers from those employees hired as firemen, on or after July 1972. Those employees that were hired under the aegis of the aforesaid

National Agreements were not eligible to rise to the rank of engineer unless they complied with the terms and conditions of these 1972 UTU National Agreements. These employees who participated in the 1972 National Training Agreement on this property were employees represented by the UTU and not the BLE, and accordingly came within the purview of the UTU and not the BLE Agreements.

Although the Board finds that firemen had to be enrolled in the UTU Training Agreement in order to be qualified for promotion to engineer, it does not find that the Carrier was precluded from securing qualified engineers from other sources, such as hiring bona fide engineers from outside this property or by transfer from another seniority district. We find the UTU to be in error when it contends that after 1972 the sole and exclusive source for engineers on this property had to be those firemen who enrolled and successfully completed the prescribed requirements of its Training Program. We find that the UTU Training Program was one way to obtain qualified engineers but it is not the only way. In short, after the Award of Arbitration Board No. 282 was rendered, the Carrier had two sources to rely upon for its prospective engineers. It could use those employees whom it hired as firemen and who successfully mastered the requirements of the 1972 National Training Agreement, and thus became eligible for promotion to the craft of engineer, or it could hire bona fide qualified engineers from the outside. The employees in the UTU Program were represented by and subject to the requisite UTU Agreements. However, those engineers hired from the outside, as qualified engineers, were subject to the BLE Agreement since

the BLE represents all employees working in the craft of engineers.

The Board finds that a given Carrier in applying and interpreting the UTU 1972 National Agreements, could conclude that it was required to rely upon this Agreement as the only source for obtaining engineers. Such a decision would be purely voluntary. It must be noted that the UTU 1972 National Agreement provided that it should be treated as individual contracts between the separate carriers and organizations executing them. As a result the individual carriers were at liberty to apply and interpret their agreement. It is evident that the Sante Fe RR applied the National Training Agreement in a different way than did this Carrier.

The Board finds that the several provisions of the National Training Agreement, which the UTU cite [sic] in support of its position, do not sustain its position. For example, Article II, Section A-2 is couched in terms of "no employee not previously qualified" will be eligible to be promoted to engineer without first entering the training program. The Board finds the use of the word "employee" to be a broader term than "fireman" and therefore the use of such a general term could encompass a qualified engineer who had previously been qualified. The Board finds no support for the UTU's position that Article II, Section A-2 was intended to refer to present, and not prospective employees. The Board finds that such language is susceptible to the conclusion that the antecedent training required by the National Agreement was not required for any individual who had previously qualified to be an engineer.

The Board also finds that the UTU's position is not convincing when it contends that the provisions found in Article II, Paragraph E, namely, "unless agreements on an individual carrier provide otherwise" refers only to UTU and not BLE Agreements. The Board concludes that the cited language, both in its context and literal terms, does not unfailingly lead to the conclusion the UTU urges on the Board.

The Board finds that language of Article I, Section 1 of the 1972 Manning Agreement does not preclude the hiring of outside engineers. The Board finds the Training and Manning Agreements do not place contractual restraints against a carrier hiring a bona fide engineer from outside the property. The Agreements provide a source, but not the sole source of engineers. Nor does the Board find the language of Article IV pertaining to satisfactorily completing the Training Program, namely, "shall be awarded a certificate so stating and shall acquire and maintain engineer's seniority in accordance with all applicable agreements", refers only to UTU Agreements. This language does not preclude BLE Agreements from being considered in dealing with engineer agreements.

In short, the Board does not find from the explicit terms and provisions of the UTU 1972 National Training and the Manning Agreements that these Agreements preclude or prohibit a carrier from hiring qualified outside engineers, among other matters.

The Board also finds, *vis a vis*, the Carrier's right to hire outside engineers that this right is not nullified when the Carrier places a qualified hired engineer in a class room program to learn the Carrier's Book of Rules, Signal

System, or the topography of the Road. The Carrier's act of hiring bona fide engineers as engineers and paying them as engineers was not vitiated because these engineers were required to learn some details of the operations. There is a material and significant difference between hiring a fireman who needs instructions and training on how to operate a locomotive, and hiring a qualified engineer, capable of operating the engine, but who needs exposure to the operational details of the Carrier. An engineer, even though he might have had many years of experience in running an engine on a foreign property, might still need some class room instruction on the Book of Rules or other informational material. The Board finds that because the hired engineer spent some time in class room instruction, it did not mean that he was not a qualified engineer who had to undergo the rigors and demands of the UTU Training Program.

When the Board turns from the 1972 UTU National Agreements to the analysis of the several Letters of Understanding and Agreements that the UTU and BLE separately and jointly negotiated with the carrier, the Board again concludes that the positions advanced by the BLE and the Carrier are more persuasive than the one posited by the UTU.

When the Board reviews the January and June 1973 Letters between the Carrier and the UTU, candor compels it to state that it found the language therein troublesome, but nevertheless, the Board concludes that these Agreements only affected firemen. For example, the January 1973 Letter specifically alludes to an individual being given a seniority date as a fireman in accordance

AMICUS CURIAE

BRIEF

No. 86-2037

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PAUL G. LANDERS,
Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS ("AFL-CIO") AND FOR THE RAILWAY LABOR EXECUTIVES' ASSOCIATION ("RLEA") AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 90 national and international labor organizations having a total membership of approximately 13,500,000 working men and women. Many of the employees represented by AFL-CIO unions work in the railroad industry.

The Railway Labor Executives' Association (RLEA) is an unincorporated association, headquartered in Washington, D.C., whose membership consists of virtually all the railway labor unions in the country, representing all

of the railroad crafts and the great majority of railroad employees.*

This brief *amici curiae* is filed by the AFL-CIO and the RLEA with the consent of the parties as provided in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court early held that the "obligation imposed on the employer by § 2 Ninth [of the Railway Labor Act ("RLA")] to treat with the true representative of the employees" is "exclusive". *Virginian Ry.* v. *Federation*, 300 U.S. 515, 548. That obligation, the Court ruled, "imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other." *Id.*

The question in this case is whether the 1951 amendments to the RLA create an exception to the exclusivity principle that entitles an employee covered by that Act to have the assistance, in presenting a grievance to his employer, of the union to which he belongs as a member and to which he pays dues pursuant to a contract authorized by § 2, Eleventh (c) of the RLA, but which is *not* the majority representative of the employee's craft or class.

The primary sources for answering that question are the language and legislative history of the RLA provisions that spell out what exclusive representation consists of under that Act and the extent to which the exclusivity principle stated in *Virginian Ry.* holds sway in different circumstances. *See*, in addition to RLA §§ 2, Ninth and 2 Eleventh (c), §§ 2 Third, § 2 Fourth and

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* Two member organizations of RLEA, the Brotherhood of Locomotive Engineers and the United Transportation Union have opposing interests in this case and, therefore have not participated in preparing this brief.

its proviso and § 3 First (i). *See also Elgin, J. & R. Co.* v. *Burley*, 325 U.S. 711, *adhered to on rehearing*, 327 U.S. 661 (considering at length the extent of the exclusive representative's authority under the RLA to settle individual grievances and to represent employees before the Adjustment Board, which is the compulsory arbitration tribunal under the RLA.) Of those materials, RLA § 2, Eleventh, which sets out the right of a majority of a craft of class of employees to require all employees represented by that representative chosen by that majority to pay their fair share of that representation, and which contains in § 2 Eleventh (c) a unique exception to the fair share requirement for operating rail employees—*viz.*, those crafts or classes of employees within the jurisdiction of the First Division of the National Railroad Adjustment Board—is, of course, at the heart of this case. Indeed, in our view, this case does not so much require a gloss on the exclusivity principle as a determination of whether § 2 Eleventh (c) of the Act modifies that principle.

The parties to this proceeding will, we know, cover those primary materials in detail. There is, however, another set of materials which throw a "crosslight" on the meaning and extent of exclusive representation in the private sector labor relations system. The exclusivity principle is also of fundamental importance under the other major Act of Congress which regulates collective bargaining, the National Labor Relations Act ("NLRA"). Decisions under the NLRA have elaborated in considerable detail on the exclusivity principle and its impact on the rights of minority employees, including—most pertinently herein—on minority claims of a right to bargain through a union other than the majority representative. To place the issues presented here in context, this brief is therefore devoted to providing the Court a summary of the NLRA law in this regard.

In presenting these materials to the Court we are, of course, fully conscious of the caution raised by Justice Harlan writing for the Court in *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 383:

> [T]he National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes. [*See also Chicago & N.W.R. Co.* v. *Transportation Union*, 402 U.S. 570, 579, n.11.]

This admonition is particularly pertinent since the precise question raised in this case cannot arise under the the NLRA; whereas, RLA § 2, Eleventh (c) permits employers and employees to agree to a union security provision whereby an employee may satisfy his obligations by paying dues to a union other than the exclusive representative, NLRA § 8(a)(3) permits only those union security agreements which provide for payment of initiation fees and periodic dues to the exclusive representative.[1] But we believe that a description of the law as it has developed under the NLRA will assist the Court by spelling out in detail the premises of the exclusivity principle—the principle which provides the starting point for this analysis in this case—and by highlighting the differences between the RLA and NLRA in the development of that principle.

Section 8(a)(5) of the National Labor Relations Act (formerly § 8(5)) declares it to be an unfair labor practice "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 9(a) of this Act. Section 9(a), in turn, presently provides:

[1] The similarities and differences between the union security provisions of the RLA and LMRA are discussed at pp. 19-21 and 40-43 of the brief for petitioners in *Communications Workers* v. *Beck* (No. 86-637 argued January 11, 1988), and pp. 10-12 of petitioners' reply brief therein.

> Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adpusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.[2]

Section 9(a) embodies the exclusivity principle under the National Labor Relations Act. Our brief traces the development of that principle in the decisions of this Court and of the National Labor Relations Board under the original NLRA (the Wagner Act) and under the 1947 Amendments (the Taft-Hartley Act).

1. The labor bill introduced by Senator Wagner in the 74th Congress made it mandatory that the representative selected by the majority would act as the entire employee group's exclusive representative. The reports of the respective Senate and House committees that acted favorably on the labor bill explained that the exclusive representation principle was necessary to achieve the objectives of collective bargaining; *viz.*, to make agreements that will stabilize business conditions and fix fair standards of working conditions, and to prevent employers from dividing the employees among themselves. The

[2] As originally enacted in 1935, the 9(a) proviso read:

> Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

House Report added specifically that employers would violate the Act by bargaining with individuals or minority groups on their own behalf on the basic subjects of collective bargaining, either separately or jointly with the exclusive representative.

This Court, from the very outset, construed NLRA § 9(a) as establishing "that the obligation to treat with the true representative was exclusive and hence imposed a negative duty to treat with no other". *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1, 45. While that decision left open the possibility of individual bargaining, the Court made clear in *J. I. Case* v. *Labor Board*, 321 U.S. 332, that its scope is exceedingly narrow, and that the collective agreement supersedes the terms of any individual contracts, whether these be more or less favorable to the individual employee. In *Medo Corp.* v. *Labor Board*, 321 U.S. 678, the Court approved the NLRB's holding that an employer had violated § 8(1) of the NLRA by bargaining over the terms of employees with a group of employees and ignoring their representative. Also, under the Wagner Act, the NLRB held that it was an unfair labor practice for an employer to accord to minority unions the right to represent and negotiate the adjustment of grievances for their members, because that right is vested exclusively in the statutory representative. *Hughes Tool Company*, 56 NLRB 981 (1944), *enforced on this ground and modified on other issues*, 147 F.2d 69 (C.A. 5 1945).

2. The 1947 Amendments to the NLRA retained § 9(a) and its exclusive representation principle while revising the language of the proviso to § 9(a) which permits individual employees to present grievances to their employer. This Court has adhered to the holdings of *J. I. Case*, *supra*, and *Medo*, *supra*, and has also determined the extent of the bargaining representative's power to adjust grievances and the individual employee's role in that process. In *Republic Steel* v. *Maddox*, 379 U.S. 650,

652, the Court held that "federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." (Emphasis in original.) And in *Emporium Capwell Co.* v. *Community Org.*, 420 U.S. 50, the Court held that individual employees may not circumvent their elective representatives to engage in bargaining with their employer even on the subject of employment discrimination. The Court held that the principle of majority rule is "central to the policy of fostering collective bargaining, where the employees elect that course". *Id.* at 62. The law guards against the representative's abuse of its authority not by circumventing the representative, but by providing individual employees and minority groups with three protections: (1) the exercise of the representative's power is confined to a "unit appropriate for the purposes of collective bargaining"; (2) the Landrum-Griffin Act, 73 Stat. 519, assures that minority voices are heard within the union; and (3) Congress has implicitly imposed upon the representative a duty of fairly and in good faith to represent the interests of minorities within the union. *Id.* at 64.

ARGUMENT

A. The Wagner Act

The initial bill that evolved into the National Labor Relations Act, introduced by Senator Wagner in 1934, did not provide for an exclusive representative where a majority of an employee group has opted for union representation.[3] But the bill which was reported out of the Senate Committee on Education and Labor provided that the National Labor Relations Board "may determine that representatives agreed upon by the majority of employees in an appropriate unit shall represent the entire unit . . . ."[4] And, the bill which Senator Wagner introduced in the 74th Congress, S.1958, removed that discretion from the Board and made it mandatory that the representative selected by the majority would act as the entire employee group's exclusive representative.[5]

Introducing S. 1958, Senator Wagner said, in part:

> These provisions conform to the democratic procedure that is followed in every business and in our governmental life, and that was embodied by Congress in the Railway Labor Act last year. Without them the phrase "collective bargaining" is devoid of meaning and the very few unfair employers are encouraged to divide their workers against themselves. [79th Cong. Rec. 2372, 1935 Leg. Hist. at 1313.]

S.1958 as reported out of the Senate Committee in addition declared it to be an unfair labor practice for

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[3] S. 2926, 73d Cong., 2d Sess., Legislative History of the National Labor Relations Act 1935 ("1935 Leg. Hist.") at 1-14.

[4] *Id.* at 1095.

[5] S. 1958, 74th Cong. 1st Sess., 1935 Leg. Hist. at 1300, emphasis added.

an employer "To refuse to bargain collectively with representatives of its employees, subject to the provisions of § 9(a)".[6] The report of the Senate Committee explained the purpose of the exclusive representation principle as follows:

> The principle of majority rule has been applied successfully by governmental agencies and embodied in laws of Congress. It was promulgated by the National War Labor Board created by President Wilson in the spring of 1918. It has been followed without deviation by the Railway Labor Board, created by the Transportation Act of 1920. Public Resolution No. 44, approved June 1934, contemplated majority rule in that it provided for secret elections. The 1934 amendments to the Railway Labor Act provided:
>
> > The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this act.
>
> And the rule is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions.
>
> The object of collective bargaining is the making of agreements that will stabilize business conditions and fix fair standards of working conditions. Since it is wellnigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule. And by long experience, majority rule has been discovered best for employers as well as employees. Workers have found it impossible to approach their employers in a friendly spirit if they remained divided among themselves. Employers like-

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[6] *Id.* at 2290.

wise, where majority rule has been given a trial of reasonable duration, have found it more conductive to harmonious labor relations to negotiate with representatives chosen by the majority than with numerous warring factions. [S. Rep. No. 573, 74th Cong. 1st Sess. 13-14, 1935 Leg. Hist. at 2312-13.] [7]

In reporting out its companion labor bill the House Committee on Labor directly addressed the issue of employer bargaining with individuals or minority groups, or their representatives other than the exclusive representatives:

> Section 9(a) incorporates the majority rule principle, that representatives designated for the purposes of collective bargaining by the majority of employees in the appropriate unit shall be the exclusive representatives of all the employees in that unit "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." As a necessary corollary it is an act of interference (under sec. 8(1)) for an employer, after representatives have been so designated by the majority, to negotiate with individuals or minority groups in their own behalf on the basic subjects of collective bargaining.
>
> • • • •
>
> It would be undesirable if this basic scale [negotiated by the exclusive representative and covering all employees in the unit] should result from negotiation between the employer and unorganized individuals or a minority group, for the agreement prob-

[7] *Id.* at 2313. The report stated also that "the bill preserves at all times the right of any individual employee or group of employees to present grievances to their employer." This was a reference to a proviso to § 9(a). In the original bill, that proviso had read: "*Provided*, That any individual employee or group of employees shall have the right at any time to present grievances to their employer *through representatives of their own choosing*." The underscored phrase was eliminated in the committee bill (*id.* at 2291). That proviso was amended in 1947; we discuss the decisions construing the amended proviso at pp. 17, 20 *infra*.

ably would not command the assent of the majority and hence would not have the stability which is one of the chief advantages of collective bargaining. If, however, the company should undertake to deal with each group separately, there would result the conditions pointed out by the present National Labor Relations Board [under the National Industry Recovery Act] in its decision in the *Matter of Houde Engineering Corporation* (1 N.L.R.B. 35 (Aug. 30, 1934)):

> It seems clear that the company's policy of dealing first with one group and then with the other resulted, whether intentionally or not, in defeating the object of the statute. In the first place, the company's policy inevitably produced a certain amount of rivalry, suspicion, and friction between the leaders of the committees. • • • Secondly, the company's policy, by enabling it to favor one organization at the expense of the other, and thus to check at will the growth of either organization, was calculated to confuse the employees, to make them uncertain which organization they should from time to time adhere to, and to maintain a permanent and artificial division in the ranks.

Speaking of the company's suggested alternative that it deal with a composite committee made up of representatives of the two major conflicting groups, supplemented by other individual employees, the Board pointed out:

> This vision of an employer dealing with a divided committee and calling in individual employees to assist the company in arriving at a decision is certainly far from what section 7(a) must have contemplated in guaranteeing the right of collective bargaining. But whether or not the workers' representation by a composite committee would weaken their voice and confuse their counsels in negotiating with the employer, in the end whatever collective agreement might

> be reached would have to be satisfactory to the majority within the committee. Hence the majority representatives would still control, and the only difference between this and the traditional method of bargaining with the majority alone would be that the suggestions of the minority would be advanced in the presence of the majority. The employer would ordinarily gain nothing from this arrangement if the two groups were united, and if they were not united he would gain only what he has no right to ask for, namely, dissention and rivalry. * * * [H.R. Rep. No. 972, 74th Cong. 1st Sess. 18-19, 1935 Leg. Hist. at 2974-75.]

When the constitutionality of the NLRA was sustained in *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1, the Court read the Act as establishing "that the obligation to treat with the true representative was exclusive and hence imposed the negative duty to treat with no other". *Id.* at 44-45, following the construction of the RLA in *Virginian Ry., supra.* The Court also followed *Virginian Ry.* by construing the NLRA " 'to prohibit the negotiation of labor contracts generally applicable to employees' in the described unit with any other representative than the one so chosen, 'but not as precluding such individual contracts' as the Company might 'elect to make directly with individual employees'." 301 U.S. at 45.

The permissible scope of such individual bargaining was, however, held to be very narrow indeed in *J.I. Case* v. *Labor Board*, 321 U.S. 332. While employers are permitted to enter into individual contracts where they are not under an obligation to bargain collectively, the Court made clear that

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. [321 U.S. at 337.]

Moreover,

> It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment. [321 U.S. at 338.] [8]

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[8] The Court took note that:

> Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining. But except as so provided, advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole. [321 U.S. at 338-39.]

On the same day that this Court announced its decision in *J.I. Case*, the Court also decided *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, concluding that individual contracts of employment do not modify the terms of an RLA collective bargaining agreement. *Id.* at 347. *Railway Express* shows that the principle of exclusivity under the RLA is virtually identical to the comparable principle under the NLRA. Indeed, as the Court noted:

In *Medo Corp.* v. *Labor Board*, 321 U.S. 678, the Court reaffirmed the principles of *Jones & Laughlin* and *J. I. Case*, in holding that an employer

> by ignoring the union as the employees' exclusive bargaining representative, by negotiating with its employees concerning wages at a time when wage negotiations with the union were pending, and by inducing its employees to abandon the union by promising them higher wages, violated § 8(1) of the Act, which forbids interference with the right of employees to bargain collectively through representatives of their own choice. * * * The statute guarantees to all employees the right to bargain collectively through their chosen representatives. Bargaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained, as the Board, the expert body in this field, has found. Such conduct is therefore an interference with the rights guaranteed by § 7 and a violation of § 8(1) of the Act. [321 U.S. at 684. See also *id.* at n. 2, quoting Sen. Rep. No. 573, 74th Cong., 1st Sess., p. 13; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 20.]

In *Medo*, the employer was held to violate the NLRA by bargaining over the terms of employment (granting a wage increase) with a group of employees and ignoring their representative. Following that logic, the National Labor Relations Board shortly thereafter held it to be an unfair labor practice for an employer to accord to minority unions the right to present and negotiate the adjustment of grievances for their members and by adjusting grievances of individual employees without af-

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The decision in *J.I. Case Co.* v. *National Labor Relations Bd.* decided today, considers more generally the relation of individual contracts to collective bargaining, and much that is said in that opinion is applicable here. [*Id.*]

fording the union, as the exclusive bargaining representative, the opportunity to negotiate respecting their disposition. *Hughes Tool Company*, 56 NLRB 981 (1944) enforced as modified, *Hughes Tool Co.* v. *National Labor Relations Board*, 147 F.2d 69 (C.A. 5, 1945). The Board explained:

> The Act makes it clear that the right to bargain collectively concerning the establishment of a grievance procedure and to conduct all bargaining for each and every employee in the unit is vested solely in the statutory representative. After the execution of a contract, any adjustment of a grievance constitutes, if the subject matter involved is dealt with in the contract, an interpretation and application of the contract, or, if the subject matter is not dealt with in the contract, bargaining respecting a condition of employment. Again it is clear that these rights are vested exclusively in the statutory representative. The interpretation and application of the terms of a contract and the establishment of precedents involved in the adjustment of grievances are often as important, or more important, than the original collective bargaining which led to the signing of the contract. *The statutory representative is exclusively entitled to negotiate concerning such interpretation, application, and precedents. No labor organization other than the representative designated by the majority is entitled to deal with the employer concerning any of these matters respecting employees within the unit.* [56 NLRB at 982 emphasis added.]

This ruling was approved by the Court of Appeals, which "agree[d]" with the Board "in principle". 147 F.2d at 73.[9]

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[9] The Board and the Court of Appeals also discussed the meaning of the § 9(a) proviso set out in n.2, *supra*. See 56 NLRB at 982-83, and 147 F.2d at 68-69. That discussion, however, is no longer pertinent because the language of the proviso was changed in 1947 and, as amended, has been authoritatively construed by this Court.

So matters stood when the 80th Congress considered the amendments to the National Labor Relations Act that resulted in the Labor-Management Relations Act of 1947.

B. Taft-Hartley Act

The Labor Management Relations Act of 1947 ("Taft-Hartley Act") substantially revised the National Labor Relations Act. In so doing, however, Congress retained the exclusive representation principle while revising the permission which the § 9(a) proviso afforded to employees to present grievances.

The understanding that where there is an exclusive representative, only that representative may negotiate on the terms and conditions of employment (unless the collective bargaining agreement provides otherwise) as established in *J. I. Case*, *supra*, and *Medo*, *supra*, remains firmly established. And decisions of this Court since the Taft-Hartley amendments have also delineated the extent of the exclusive representative's power to adjust grievances, and the individual employee's role in that process.

In *Republic Steel* v. *Maddox*, 379 U.S. 650, Justice Harlan wrote for the Court:

> As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available. See *Humphrey* v. *Moore*, 375 U.S. 335; *Labor Board* v. *Miranda Fuel Co.*, 326 F.2d 172. But unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. LMRA § 203(d), 29 U.S.C. § 173(d); § 201(c), 29 U.S.C. § 171(c) (1958 ed.). Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so. [379 U.S. at 652-53, emphasis in original.]

In an accompanying footnote, the Court stated that the "proviso of § 9(a) . . . is not contra". 379 U.S. at 652, n.7, citing *Black-Clawson Co.* v. *Machinists*, 313 F.2d 179 (C.A. 2 1962).[10]

These principles were reaffirmed and adhered to in *Emporium Capwell Co.* v. *Community Org.*, 420 U.S. 50, 52, which presented "the question whether, in light of the national policy against racial discrimination in employment, the National Labor Relations Act protects concerted activity by a group of minority employees to bargain with their employer over issues of employment dis-

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[10] In *Black-Clawson*, the Second Circuit, after reviewing the reports of the House Committee on Education and Labor and of the Conference Committee, concluded:

> It seems clear, therefore, that rather than conferring an indefeasible right upon the individual employee to compel compliance with the grievance procedure up to and including any arbitration provision, section 9(a) merely set up a buffer between the employee to take his grievances to the employer, and "authorizing" the employer to hear and adjust them without running afoul of the "exclusive bargaining representative" language of the operative portion of section 9(a). [313 F.2d at 185.]

cirmination." The Court held that the employees could not circumvent their elected representative to engage in such bargaining:

> Central to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). If the majority of a unit chooses union representation, the NLRA permits it to bargain with its employer to make union membership a condition of employment, thereby imposing its choice upon the minority. 29 U.S.C. §§ 157, 158(a)(3). In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority. *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 338-339 (1944); H. R. Rep. No. 972, 74th Cong., 1st Sess., 18. As a result, "[t]he complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953). [420 U.S. at 62.][11]

Then, after discussing what had been said about "the underpinnings of the majoritarian principle" in *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, the Court identified three separate protections which national labor policy affords to minority interests:

> First, it confined the exercise of these powers to the context of a "unit appropriate for the purposes of collective bargaining," *i.e.*, a group of employees with a sufficient commonality of circumstances to ensure against the submergence of a minority with distinctively different interests in the terms and conditions of their employment. See *Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. 157, 171 (1971). Second, it undertook in the 1959 Landrum-Griffin amendments, 73 Stat. 519, to assure that minority voices are heard as they are in the functioning of a democratic institution. Third, we have held, by the very nature of the exclusive bargaining representative's status as representative of *all* unit employees, Congress implicitly imposed upon it a duty fairly and in good faith to represent the interests of minorities within the unit. *Vaca* v. *Sipes* [386 U.S. 171]; *Wallace Corp.* v. *NLRB*, 323 U.S. 248 (1944); cf. *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192 (1944). [420 U.S. at 64, emphasis in original.][12]

"Against this background of long and consistent adherence to the principle of exclusive representation tempered by safeguards for the protection of minority interests", the Court then evaluated the respondent's contention that the Court should "fashion a limited exception for that principle [in favor of] employees who seek to bargain separately with their employer as to the elimination of a racially discriminatory employment practice peculiarly affecting them * * *" (420 U.S. at 65). Although "national labor policy embodies the principles of nondiscrimination as a matter of highest priority" (*id.* at 66, citing *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 46, 47), the Court rejected that contention:

> The policy of industrial self-determination as expressed in § 7 does not require fragmentation of the bargaining unit along racial or other lines in order to consist with the national labor policy against discrimination. And in the face of such fragmentation, whatever its effect on discriminatory practices, the bargaining process that the principle of exclusive

[11] The Court quoted Senator Wagner's statement which is set forth at p. 8, *supra*. 420 U.S. at n.12.

[12] In *Vaca* and in *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, the Court held that where a union breaches its duty of fair representation in administering a grievance, the adversely affected employee may challenge the resolution of that grievance notwithstanding the decision in *Republic Steel* v. *Maddox*, *supra*.

representation is meant to lubricate could not endure unhampered. [420 U.S. at 70.]

Earlier in its opinion in *Emporium Capwell*, the Court, in addressing a separate contention, had also rejected the respondent's reliance on the proviso to § 9(a):

> Respondent clearly misapprehends the nature of the "right" conferred by this section. The intendment of this proviso is to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative, a violation of § 8(a)(5). H. R. Rep. No. 245, 80th Cong., 1st Sess., 7 (1947); H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., (House Managers' statement), 46 (1947). The Act nowhere protects this "right" by making it an unfair labor practice for an employer to refuse to entertain such a presentation, nor can it be read to authorize resort to economic coercion. This matter is fully explicated in *Black-Clawson Co.* v. *Machinists*, 313 F.2d 179 (CA2 1962). See also *Republic Steel* v. *Maddox*, 379 U.S. 650 (1965). If the employees' activity in the present litigation is to be deemed protected, therefore, it must be so by reason of the reading given to the main part of § 9(a), in light of Title VII and the national policy against employment discrimination, and not by burdening the proviso to that section with a load it was not meant to carry. [420 U.S. at 61, n. 12.]

In sum, under the National Labor Relations Act, the "exclusive representation" principle means that only the majority representative chosen by a majority in an appropriate unit in accordance with § 9(a) has the right to deal with employers over contract terms and in the adjustment of grievances.

Respectfully submitted,

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